A.R.S. § 41-192(A)(8) requires the Attorney General to “compile, publish and distribute to . . . persons and government entities on request, at least every ten years, the Arizona agency handbook.” Due to the high cost of publishing, the current version of the Handbook is posted on the Attorney General’s Web site to satisfy this statutory requirement. (Revised 2011)

PREFACE

I proudly present the 2011 edition of the Arizona Agency Handbook. This publication is intended to provide guidance to State officers and employees and to the lawyers who represent the State or appear before its boards and agencies. The Handbook does not itself create legal rights or obligations; instead it is a reference source that discusses laws otherwise created by statutes, regulations, and the state or federal constitutions.

This edition of the Handbook supersedes the 2001 edition and reflects the many changes that have occurred in the laws governing state agencies. Among other things, the 2011 edition addresses the significant new or amended laws on such topics as open meetings, public records, discrimination law, administrative adjudications, and rulemaking.

The 2011 edition of the Handbook is available on the website of the Attorney General's Office at www.azag.gov. Individual chapters will be updated periodically to reflect significant legal developments, and such revisions will be posted on the website as they become available. Comments and suggestions concerning the Handbook are welcome and should be sent to the Solicitor General's Office at the Office
of the Attorney General, 1275 W. Washington Street, Phoenix, Arizona, 85007.

Updating the Handbook required many hours of work by lawyers, legal assistants, and other staff throughout the Attorney General's Office, and I sincerely thank all of those who did the research, writing, editing, proof reading, and cite checking necessary to complete this massive project.

Very truly yours,

Attorney General Tom Horne

---

**ARIZONA AGENCY HANDBOOK**

**HANDBOOK COORDINATORS**

DAVID R. COLE, Solicitor General  
MARY JO FOSTER, Special Counsel, Ethics & Training

**CONTRIBUTORS**

JIM BARTON  
NANCY BECK  
PAULA S. BICKETT  
SAMANTHA BLEVINS  
NANCY BONNELL  
CARRIE BRENNAN  
DENNIS CARPENTER  
TOM COLLINS  
JOAN DALTON  
SUSAN DAVIS  
ARDYN FEKEN  
CHARLES FERRIS  
JEANNE GALVIN  
BETSY GORDON  
VALLI GOSS  
JAMIE HARDING  
JOY HERNBRODE  
ANN HOBART  
LAUREN LOWE  
MARNI MCELHINNY  
MARTHA MCLINDON  
MARIA MORLACCI  
CHRIS MUNNS  
REX NOWLAN  
DAN SCHAAACK  
BOB SOKOL
TABLE OF CONTENTS

CHAPTER

01. THE ATTORNEY GENERAL AND THE DEPARTMENT OF LAW
02. PUBLIC OFFICERS AND EMPLOYEES
03. PERSONNEL
04. PUBLIC MONIES
05. PROCUREMENT
06. PUBLIC RECORDS
07. OPEN MEETINGS
08. CONFLICT OF INTEREST
09. LICENSING
10. ADMINISTRATIVE ADJUDICATIONS
11. RULEMAKING
12. ENFORCEMENT
13. LITIGATION AGAINST STATE ENTITIES
14. DETECTION OF CRIMINAL VIOLATIONS
15. DISCRIMINATION LAW
16. LOBBYING

INDEX
CHAPTER 1
THE ATTORNEY GENERAL AND THE DEPARTMENT OF LAW

Table of Contents

Section 1.1  Scope of This Chapter
Section 1.2  Establishment of the Office of the Attorney General
Section 1.3  Statutory Powers and Duties of the Attorney General
  1.3.1  General Powers and Duties
  1.3.2  Power to Organize Office and Organizational Structure of the Department of Law
  1.3.3  Employment of Legal Counsel by the Attorney General and State Agencies
  1.3.4  General Representation Powers
  1.3.5  Representation of Individual Officers and Employees in Civil Actions
  1.3.6  Power to Settle Claims and Lawsuits Against the State and Boards, Commissions, and Agencies of the State
  1.3.7  Powers and Duties Relating to County Attorneys
  1.3.8  Opinion-Writing Authority
  1.3.9  Power to Approve Administrative Rules
  1.3.10  Authority to Approve Bonds
  1.3.11  Power to Enforce Criminal Laws
  1.3.12  Power to Enforce the Consumer Fraud Act
  1.3.13  Power to Enforce the State Antitrust Act
  1.3.14  Power to Enforce the State Civil Rights Act

Revised 2011
1.3.15 Power to Collect Debts
1.3.16 Power to Enforce the Arizona Open Meeting Law
1.3.17 Power to Enforce Arizona Immigration Related Statutes
1.3.18 Miscellaneous Powers and Duties

Section 1.4 Role of the Attorney General in Representing and Advising State Administrative Agencies, Public Officers, and Employees
1.4.1 Administrative Agencies
1.4.2 Public Officers and Employees
1.4.3 Legal Assistance to Members of the Public
1.4.4 Legislative Representation for Public Officers and Employees

Section 1.5 Role of the Attorney General in Issuing Legal Opinions
1.5.1 Authority to Issue Opinions
1.5.2 Request Procedure
1.5.3 Scope of Opinions
1.5.4 Education Opinions
1.5.5 Opinion Summaries

Section 1.6 Role of the Attorney General in the Adoption of Administrative Rules

Section 1.7 Role of the Attorney General in Approving Contracts, Leases, and Intergovernmental Agreements
1.7.1 Contracts and Leases
1.7.2 Intergovernmental Agreements

Section 1.8 Investigative Services Within the Department of Law

Section 1.9 Attorney General’s Guidelines for Representing State Agencies

Revised 2011
1.9.1 Scope of the Attorney General's Duty to Represent State Agencies

1.9.2 Attorney General's Representational Role for the State, Its Agencies, and Employees

1.9.2.1 Attorney General's Attorney-Client Relationship to the State, Its Agencies and Employees

1.9.2.2 Attorney Client Privilege and Waiver of the Privilege

1.9.2.3 Agency Requests for Actions or Defenses That Are Not Legally Supportable or Are Interposed for Delay

1.9.2.4 Adverse Interests Other Than Enforcement Actions

1.9.2.5 Illegal Activity or Other Action Requiring Enforcement Actions Against State Officials

1.9.3 Multiple Representation of State Agencies

1.9.3.1 Scope of Section

1.9.3.2 Non-Judicial Proceedings

1.9.3.3 Quasi-Judicial Proceedings

1.9.3.4 Judicial Proceedings

1.9.4 Agency Adjudicatory Proceedings

1.9.4.1 Scope of Section

1.9.4.2 Advocate

1.9.4.3 Selection of Advisor

1.9.4.4 Participation in Preliminary Matters

1.9.4.5 Prohibition on Communication Between the Advocate and Advisor

1.9.4.6 Limitations on Advocate

1.9.4.7 Limitations on Advisor

1.9.4.8 Disregard of Advice

Revised 2011
1.9.4.9 Judicial Review

1.9.4.10 Comments

1.9.5 Agency Representation by Outside Counsel

1.9.5.1 Authority to Proceed

1.9.5.2 Available Funds

1.9.5.3 Appointment

1.9.5.4 Control of Appointed Counsel

1.9.6 Attorney General’s Membership on Quasi-Judicial Public Entities

1.9.6.1 General Rule

1.9.6.2 Issues of Compelling Public Interest
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, particularly as they concern state agencies, officers, and employees. The Attorney General’s Office, also referred to as the Department of Law, provides legal advice to state agencies, except those specifically exempted by statute. This Chapter is intended to help state agencies, officers, and employees identify when they should seek assistance from the Attorney General’s Office. Appendix 1.1 contains an organizational chart identifying the divisions and sections within the office. If questions arise that are not addressed in this Chapter, state agencies and other state entities should contact either their assigned Assistant Attorney General or the chief counsel for the appropriate division or section. For issues related to litigation against state agencies, officers, and employees, see Chapter 13.


1.3 Statutory Powers and Duties of the Attorney General.

1.3.1 General Powers and Duties. The legislature has prescribed the general powers and duties of the Attorney General in Arizona Revised Statutes ("A.R.S.") §§ 41-191 to -198. The Attorney General directs the Department of Law ("the Department") and serves as the chief legal officer of the State and the various departments and agencies of the State. A.R.S. § 41-192(A). The following subsections of this Chapter focus on the powers and duties of the Attorney General in advising and representing state agencies. These subsections are not exhaustive; they merely describe the general powers and duties of the Attorney General. Agencies should review this Chapter and the statutes creating the agency and defining the agency’s authority to ascertain whether the Attorney General has specific powers and duties pertaining to that agency.

1.3.2 Power to Organize Office and Organizational Structure of the Department of Law. The Attorney General may organize the Department into bureaus, subdivisions, or units for the efficient and economical operation of the Department. A.R.S. § 41-192(B)(1). The Attorney General may also consolidate or abolish bureaus,
subdivisions, or units within the Department. *Id.* The Attorney General is required by law to organize a civil rights division within the Department and to enforce the civil rights laws. A.R.S. §§ 41-192(A)(7), -1401. (For a discussion of Arizona and federal civil rights laws, see Chapter 15.) The Attorney General may hire and assign assistant attorneys general and other employees as are "necessary to perform the functions of the department." A.R.S. § 41-192(B)(3).

An organizational chart of the Department, listing the divisions and sections and briefly describing their functions and responsibilities, is attached as Appendix 1.1.

**1.3.3 Employment of Legal Counsel by the Attorney General and State Agencies.** Except as otherwise provided by law, state agencies other than the Attorney General are prohibited from employing legal counsel or incurring an expense or a debt for legal services. A.R.S. § 41-192(E). The following agencies are exempt from this prohibition: the Residential Utility Consumer Office, the Director of Water Resources, the Industrial Commission, the Arizona Board of Regents, Corporation Commissioners and the Corporation Commission (other than its Securities Division), the Office of the State Treasurer, the Governor's Office, the Arizona Health Care Cost Containment System Administration, the Auditor General, the Arizona Commerce Authority, and the Arizona Power Authority in federal agency and court matters. See A.R.S. §§ 15-1626(A)(12), 36-2903(N), 40-106, 41-192(E), 41-192.01.

If the Attorney General determines that the Attorney General's Office is disqualified from providing legal representation or services to any state agency on any matter, the Attorney General must notify the state agency in writing of his or her determination. A.R.S. § 41-192(F). Upon receipt of such notice, the agency "is authorized to make expenditures and incur indebtedness to employ attorneys to provide the representation or services" that the Attorney General is disqualified from providing. *Id.*

The Attorney General is required to provide legal services to certain agencies and departments. Compensation for such services is charged against the appropriations to that department or agency. See, e.g., A.R.S. § 28-333. Other agencies and departments are authorized to employ and pay for legal services with the consent of the Attorney General. For example, A.R.S. § 38-848(N) provides that the "attorney general or an attorney approved by the attorney general and paid by the [Public Safety Personnel Retirement Fund]" shall be the attorney for the fund manager.

**1.3.4 General Representation Powers.** As a state agency's advisor, the Attorney General represents the agency in both administrative and judicial proceedings concerning the enforcement of the agency's statutes, rules, and orders. As the chief legal officer of the State, the Attorney General is required to prosecute and defend in the Arizona Supreme Court "all proceedings in which the state or an officer thereof in his official capacity is a party." A.R.S. § 41-193(A)(1). In addition, the Attorney General, "[a]t the direction of the governor or when deemed necessary by the attorney general," is required 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." A.R.S. § 41-193(A)(2). The Attorney General also has the duty to "[r]epresent the state in any action in a federal court." A.R.S. § 41-193(A)(3).

Under certain circumstances, the Attorney General represents political subdivisions of the State. The Attorney General represents school districts, governing boards of school districts, and fire districts in lawsuits in which a conflict of interest between county offices exists. See A.R.S. §§ 41-192(A)(4), -192.02(B). The Attorney General also represents "political subdivisions, school districts and municipalities 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)(5).

1.3.5 Representation of Individual Officers and Employees in Civil Actions. The Attorney General may, in his or her discretion, represent a state officer or employee against whom a civil action is brought in . . . [the state officer's or employee's] individual capacity until . . . 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.

A.R.S. § 41-192.02(A). See Chapter 13 for a more detailed discussion of the liability of state officers, agents, and employees, and the Attorney General's role in handling claims and lawsuits involving state officers, agents, and employees.

1.3.6 Power to Settle Claims and Lawsuits Against the State and Boards, Commissions, and Agencies of the State. The procedure for settling claims for damages against the State or any state officer, department, board, or agency is determined by the amount of the proposed settlement. Claims for damages up to $25,000, or such higher limit as the Joint Legislative Budget Committee may establish, may be settled with the approval of the Director of the Department of Administration ("DOA"). A.R.S. § 41-621(N). The Joint Legislative Budget Committee has authorized the DOA Director to approve settlements up to $100,000. Claims between $100,000 and $250,000 may be settled with the approval of the Director of DOA and the Attorney General. Claims over $250,000 may be settled with the approval of the Director of DOA, the Attorney General, and the Joint Legislative Budget Committee. Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A). State departments, agencies, boards, commissions, officers, agents, or employees may not voluntarily make any payment, assume any obligation, incur any expense, or maintain the individual right of consent for liability claims. A.R.S. § 41-621(N). See Section 13.5.3. See Chapter 13 for a more detailed description of the State's self-insurance program and the role of the Attorney General in that program.
The Attorney General is authorized to settle other claims not involving liability self-insurance with the approval of the governor or the department, board, or agency involved. A.R.S. § 41-192(B)(4).

1.3.7 Powers and Duties Relating to County Attorneys. The Attorney General is required to represent school districts, the governing boards of school districts, and fire districts if the county attorney has a conflict of interest that precludes or renders inappropriate continued representation by the county attorney. A.R.S. §§ 41-192(A)(4), -192.02(B). In addition, the Attorney General may "exercise supervisory powers over county attorneys . . . in matters pertaining to that office" and shall, "[a]t the direction of the governor, or when deemed necessary, assist [a] county attorney . . . in the discharge of the county attorney’s duties." A.R.S. § 41-193(A)(4), (5). Finally, the Attorney General must concur in, revise, or decline to review education opinions issued by county attorneys or their designates. A.R.S. § 15-253(B). See Section 1.5.4.

1.3.8 Opinion-Writing Authority. The Attorney General is authorized to render a written opinion "[u]pon demand by the legislature, or either house or any member thereof, any public officer of the state, or a county attorney, . . . upon any question of law relating to their offices." A.R.S. § 41-193(A)(7). See Section 1.5 for a discussion of Attorney General opinions.

1.3.9 Power to Approve Administrative Rules. The Attorney General is required to review and authorized to approve emergency rules and rules proposed by a State agency that are exempt from review by the Governor's Regulatory Review Council. A.R.S. §§ 41-1026, -1044. See Section 1.6 of this Chapter describing the Attorney General's role in rule making and Chapter 11 for detailed discussions on the procedures for adopting rules.

1.3.10 Authority to Approve Bonds. The Attorney General is required to review and authorized to approve various forms of government bonds. See, e.g., A.R.S. § 9-534 (municipal bonds); A.R.S. § 15-1489 (education bonds); A.R.S. § 28-7514 (transportation bonds); A.R.S. § 30-227(F) (Arizona Power Authority bonds); and A.R.S. § 36-1414 (housing bonds). Because the Attorney General often plays a role in the issuance of bonds, an agency should consult with the Attorney General's Office.

1.3.11 Power to Enforce Criminal Laws. The Attorney General is required to present evidence of criminal conduct to a magistrate or to the State Grand Jury and to prosecute all charges issued by a magistrate and all indictments returned by the State Grand Jury. A.R.S. §§ 21-424, -427(B). Generally, the State Grand Jury and the Attorney General have jurisdiction over white collar crime, organized crime, public corruption, certain crimes involving the use of computers, and crimes that occur 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
In addition, criminal wrongdoing "that is referred in writing by a county attorney and that is accepted in writing by the attorney general" is within the jurisdiction of the State Grand Jury. A.R.S. § 21-422(B)(7).

The Attorney General also investigates and prosecutes violations of the State's Racketeering Act, A.R.S. §§ 13-2301 to -2323. The Racketeering Act defines racketeering as acts punishable by imprisonment for more than one year, and either constituting terrorism, animal terrorism or ecological terrorism or certain acts committed for financial gain, including homicide, robbery, kidnapping, forgery, bribery, gambling, usury, extortion, obstructing justice, false claims or statements, securities or land fraud, money laundering, the sexual exploitation of children and other listed activities. A.R.S. § 13-2301(D)(4)(a)-(b).

The Act provides criminal penalties and civil remedies for controlling any business either with racketeering proceeds or through racketeering activity, and for conducting a business through racketeering activity. A.R.S. §§ 13-2312, -2314. The Attorney General is authorized to obtain injunctive relief, disgorgement, divestiture, damages, and other civil remedies against persons engaged in racketeering. A.R.S. § 13-2314. Any agency that discovers conduct that falls within the Racketeering Act should report that conduct to the Attorney General's Office.

The Attorney General also is required to notify the respective county attorneys of state grand jury investigations and proposed indictments affecting such counties, and must inform the appropriate prosecutorial authority of any offenses discovered by the State Grand Jury for which it lacks jurisdiction to indict. A.R.S. §§ 21-422(C), -426. In addition to those offenses provided in A.R.S. § 21-422, the Attorney General may or must:

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

B. Prosecute offenses arising out of the operation of a discount buyer's organization or service. A.R.S. §§ 44-1797.20.

C. Prosecute violations of the State's employment security program. A.R.S. § 23-656(B).


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


G. Prosecute offenses arising out of the administration of the tax laws under Titles 42 and 43 or gambling. A.R.S. § 21-422(B)(1), (2).
H. Prosecute offenses related to the operation of pyramid schemes. A.R.S. § 44-1732.

I. Prosecute environmental crimes. A.R.S. §§ 49-263(F), -925(C).

J. Prosecute violations of state bidding and purchasing laws. A.R.S. §§ 34-258, 41-2616(D).

K. Prosecute offenses under 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.


M. Prosecute healthcare kickbacks and related frauds. A.R.S. § 13-3713(G).


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

P. Investigate and prosecute offenses related to lobbying and gifts to public officials. A.R.S. § 41-1237(B).

Q. Prosecute offenses relating to county, community college, and school district audits. A.R.S. § 41-1279.22(D).


S. Prosecute violations of the insurance laws. A.R.S. § 20-152.

T. Prosecute violations of state law regarding foreclosure consultants. A.R.S. § 44-1378.07.


V. Take action to abate nuisances. A.R.S. §§ 12-991, -998, 13-2917.

1.3.12 Power to Enforce the Consumer Fraud Act. The Attorney General 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 the advertisement or sale of any merchandise or service. A.R.S. § 44-1522(A). The Attorney General may obtain injunctive
relief, restitution, and civil penalties against any person found to be in violation of the Act. A.R.S. §§ 44-1528, -1531.

As part of the Attorney General's investigative efforts under the Consumer Fraud Act, the Attorney General's Office receives and processes thousands of written complaints from consumers each year. In processing these complaints, the Attorney General's Office encourages cooperation from the relevant agencies and urges them to resolve complaints within their jurisdiction. If a complaint falls within the jurisdiction of a particular 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), the Consumer Protection and Advocacy Section will refer the complaint to that agency. On the other hand, if an agency receives a complaint involving fraudulent or deceptive practices that does not fall within the agency's jurisdiction or that the agency lacks the means to resolve, the agency should refer the complaint to the Consumer Protection and Advocacy Section of the Attorney General's Office. However, even when an agency is able to pursue a particular matter, it should send two copies of the complaint involving fraud or deception to the Consumer Protection and Advocacy Section.

1.3.13 Power to Enforce the State Antitrust Act. The Attorney General has the authority to enforce the provisions of the Arizona Uniform State Antitrust Act, A.R.S. §§ 44-1401 to -1416. A.R.S. § 44-1407. Private parties may also enforce the Act through private litigation. A.R.S. § 44-1408(B). The Antitrust Act prohibits conspiracies and agreements in restraint of trade or commerce; conspiracies and agreements to monopolize; the establishment, maintenance, or use of a monopoly; and attempts to monopolize. A.R.S. §§ 44-1402.

Because the State and its agencies are subject to the Antitrust Act, government employees should be aware that their actions may be subject to its provisions. See A.R.S. § 44-1416. State officials routinely enter into agreements and take actions that affect trade and commerce. Only in certain circumstances are state officers immune from antitrust prosecution. See Sections 5.9.9 and 5.9.6.1. Chapter 5 (Procurement) contains the most extensive overview of antitrust law and should be reviewed by agency personnel who may become involved in competition issues.

Any person who serves a complaint, counterclaim, or answer in an action alleging an antitrust violation must also serve a copy of the pleading on the Attorney General. A.R.S. § 44-1415(A). In addition, if any special action or appeal is filed involving an antitrust issue, a notice of the action must be served on the Attorney General. A.R.S. § 44-1415(B). The Attorney General may appear in any civil action or proceeding before any Arizona court, agency, board, or commission in which antitrust matters appear to be at issue. A.R.S. § 44-1415(C). If an agency believes that a matter may involve an antitrust issue, the agency should advise the Attorney General's Economic Competition Unit.

1.3.14 Power to Enforce the State Civil Rights Act. The Attorney General is required to enforce the Arizona Civil Rights Act, A.R.S. §§ 41-1401 to -1493.03. A.R.S.

These statutes generally provide that the Attorney General must investigate violations of an individual's civil rights in these areas upon the receipt of a written complaint. A.R.S. §§ 41-1471(A), -1481(B), -1491.22, -1492.09. If the Attorney General determines there is reasonable cause to believe that the charge is true, the Department must attempt to correct the violation by means of conference, conciliation, or persuasion. A.R.S. §§ 41-1471(C), -1491.26. In certain situations, the Attorney General may initiate a lawsuit to correct the violation or authorize the charging party to file such a suit. A.R.S. §§ 41-1471(D) and (E), -1481(D) and (E), -1491.27. See Chapter 3 regarding personnel and Chapter 15 regarding discrimination law.

1.3.15 Power to Collect Debts. Pursuant to A.R.S. §§ 41-191(E), -191.03, and -191.04, the Attorney General has the power to initiate legal action to collect debts owed to the State or to any agency, board, commission, or department of the State. The Attorney General's debt collection program is supported by a collection enforcement revolving fund. A.R.S. § 41-191.03. The collection program is administered by the Bankruptcy and Collection Enforcement Section of the Agency Counsel Division.

1.3.16 Power to Enforce the Arizona Open Meeting Law. The Attorney General enforces the Open Meeting Law, A.R.S. §§ 38-431 to -431.09. A.R.S. § 38-431.07(A). The requirements of the Open Meeting Law are described in Chapter 7.

1.3.17 Power to Enforce Arizona Immigration Related Statutes. The Attorney general is given powers and responsibilities related to immigration. For example, state statute bars the employment of unauthorized aliens and provides penalties for the knowing, A.R.S. § 23-212, or intentional, A.R.S. § 23-212.01, employment of such persons. The attorney general must provide a complaint form for complaints relating to the employment of an unauthorized alien. A.R.S. §§ 23-212(B); -212.01(B). When such a complaint is received, the Attorney General must investigate. Id. The Attorney General has discretion to investigate where the prescribed form is not used. Id. The claim form is available on the Attorney General's website, http://www.azag.gov/LegalAZWorkersAct/LegalAzWorkersComplaint.pdf. During the initial investigation, the attorney general “shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to [federal law].” A.R.S. §§ 23-212(B), -212.01(B).
If the Attorney General determines that a complaint is not “false and frivolous,” he or she must notify both the federal government and local law enforcement of the unauthorized alien. A.R.S. §§ 23-212(C), -212.01(C). The Attorney General must also notify the appropriate county attorney to bring an action under the statute. A.R.S. §§ 23-212(C), -212.01(C). The Attorney General is also required to maintain court orders received from actions under the statute and maintain a database of employers and business locations where a first violation of § 23-212(A) or § 23-212.01(A) occurred. A.R.S. § 23-212(G), -212.01(G). Court orders must be made available on the Attorney General’s website. Id.


The Attorney General is also responsible for enforcing the prohibition against the unauthorized practice of immigration and nationality law. A.R.S. §§ 12-2703, -2704.

1.3.18 Miscellaneous Powers and Duties. The Attorney General may release State liens on real estate, A.R.S. § 33-724(C); bring actions to enjoin the illegal payment of public monies or to recover state money illegally paid, A.R.S. § 35-212(A); approve interstate agricultural and horticultural agreements, A.R.S. § 3-221(B); seek dissolution of corporations, A.R.S. § 10-1430(A); 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(A); investigate extradition cases at the request of the governor, A.R.S. § 13-3844; handle quiet title actions, A.R.S. § 12-1101(B); 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(A).

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 or she is charged with the duty of coordinating the legal affairs of a multitude of clients, each of which is responsible to the public. In addition, the Attorney General, as a constitutional officer and elected official, is also entrusted with the duty to protect the public interest and defend the state constitution.

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

Although more than one Assistant Attorney General may provide legal services to an agency, one assistant is usually assigned primary responsibility for furnishing the services. Any legal questions that an agency has should be first addressed to this attorney. If he or she is unavailable, the agency should consult the chief counsel of the division or section in which the primary attorney works. All requests for legal assistance should come through the head of the agency, his or her 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's role in most civil matters is to give legal advice. Once advice is rendered, the Attorney General's role in the decision-making process is completed. The Attorney General will also assist the agency to varying degrees by providing legal advice and representation in adjudicatory proceedings, licensing matters, rule-making proceedings, enforcement proceedings, and employee disciplinary matters. The Assistant Attorney General assigned to an agency will not perform administrative duties, maintain agency records, decide matters of policy, or make the decisions that the law requires the agency to make. 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 1.9. In setting priorities for the many requests for legal assistance that it receives from agencies, the Attorney General's Office considers the importance of the request, its bearing upon the Attorney General's obligation to the agency concerned, and its need for attention compared to other agencies' needs.

Because the Attorney General is elected by the people of this State, he or she has, in addition to the obligation to provide legal representation to state agencies, an obligation to the people of the State to ensure that the laws governing state agencies are carried out in a manner that is consistent with the legislature's intent. The Attorney General is responsible for ensuring that the laws the legislature has enacted are enforced. The Attorney General's resources are not available to help any agency avoid duties, obligations, and laws. If an agency disagrees with the laws within its jurisdiction, it should seek a legislative change because the legislature is the proper body to address changes, alterations, or modifications to laws.

1.4.2 Public Officers and Employees. The Attorney General can render legal advice only on matters relating to a public officer's or employee's public duty or employment. The Attorney General cannot give legal advice to public officers or employees on legal problems pertaining to personal matters resulting from conduct outside the scope of their employment, appointment, or election.

The Attorney General is charged with investigating public corruption and other illegal activities that may involve public officers or employees. Consequently, the Attorney General will not represent officers or employees accused of these activities and will vigorously investigate and prosecute 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 Sections 1.9 to 1.9.6.2.

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. The Attorney General cannot engage "directly or indirectly . . . in the private practice of law." 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, he or she should seek assistance and guidance from the Legislative Council, either directly or through an interested member of the legislature. The agency should also notify the Assistant Attorney General assigned to that agency of any proposed legislation. The Attorney General may provide guidance and advice to agencies 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 Attorney General is authorized to provide a written opinion on selected issues when requested to do so by the legislature, the house of representatives, the state senate, any state legislator, any public officer of the State, or a county attorney. A.R.S. § 41-193(A)(7). Opinions must address a question of law relating to the office of the person requesting the opinion. Id. All official opinions of the Attorney General are rendered in writing. Id. The Attorney General is required to distribute a copy of each opinion to the governor, the president of the senate, the speaker of the house, the secretary of the senate, the chief clerk of the house, and any department or agency required to perform a function necessary to implement the opinion. A.R.S. § 41-194(A).

Pursuant to A.R.S. § 38-507, requests for opinions concerning violations of Title 38, Chapter 3, Article 8 (conflicts of interest) are confidential, but once the opinion issues, it is a matter of public record and therefore must be made available to the public. A.R.S. § 41-194(A). Other opinion requests not covered by a specific grant of confidentiality are considered public records and are made available to the public, if requested.

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 should be directed to the Attorney General personally. Requests for opinions from a state agency must be signed by the agency director. After a proper request is received, a draft opinion will be prepared, and, upon the Attorney General's review and concurrence, the Attorney General will issue the opinion to the requesting party.

Upon receipt, every opinion request is assigned a number for reference (an "R" number, e.g., R99-001). 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., I99-001) by which it is permanently filed.

1.5.3 Scope of Opinions. Only formal written opinions signed by the Attorney General are official opinions of the Attorney General. See A.R.S. § 41-193(A)(7). This does not mean, however, that an agency cannot rely on 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.

Formal opinions are issued on questions of law relating to the official duties of the requesting party. The Attorney General does not issue all opinions that are requested. Generally, opinions will not be issued regarding (1) matters pending before a court, Ariz. Att'y Gen. Op. I81-137; but see Ariz. Att'y Gen. Op. I91-002; (2) the constitutionality of legislation enacted by the Arizona legislature except in cases where a compelling need for such an opinion exists, Ariz. Att'y Gen. Op. I95-14; (3) legal questions from constituents or third parties, Ariz. Att'y Gen. Ops. I78-81, -83; or (4) the constitutionality of proposed legislation.


1.5.4 Education Opinions. The Attorney General, within sixty days of receipt, must concur in, 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), -1448(H). The Attorney General has the authority only to review education opinions and does not accept opinion requests directly from school district governing boards. Ariz. Att'y Gen. Op. I80-059. Governing board members are not personally liable for acts done in reliance on a written opinion that the Attorney General concurs with, declines to review, or revises. A.R.S. § 15-381(B).

1.5.5 Opinion Summaries. Summaries of Attorney General opinions are published by the Secretary of State in the Administrative Register. A.R.S. § 41-1013(B)(4).

1.6 Role of the Attorney General in the Adoption of Administrative Rules. The Attorney General does not prepare rules for state agencies. That is the responsibility of each agency. See *Yes on Prop 200*, 215 Ariz. at 467, 160 P.3d at 1225 (“Nor does the Attorney General have the ability, let alone the duty, to compel other state agencies or departments to make rules or regulations in connection with their operations.”). The Attorney General will advise the agency on the proper procedures to follow in promulgating rules and informally review draft rules to identify obvious legal defects or problems. However, the Attorney General may occasionally suggest the adoption of rules by an
agency because of pending litigation, legislation affecting all state agencies, or issues of statewide application.

The Attorney General is statutorily required to formally review and approve rules in two situations: (1) when an agency wishes to adopt emergency rules under A.R.S. § 41-1026; and (2) when a rule is expressly exempted from the normal rule-making process by A.R.S. § 41-1057. See A.R.S. § 41-1044. Chapter 11 provides a detailed explanation of the procedure for adopting, amending, or repealing rules.

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

1.7.1 Contracts and Leases. Section 41-192(A)(1) establishes that the Attorney General shall “[b]e the legal advisor of the departments of this state and render such legal services as the departments require.” Therefore, the Attorney General may review contracts and leases at the request of any state agency.

Because many state agencies often use form contracts, the Attorney General should review these forms frequently to ensure that they comply with changing legal requirements. Often, it is necessary to draft an original agreement in order to address a new situation. In these instances, the agency should consult the Attorney General to protect it from unexpected liability or a waiver of rights due to a poorly drafted contract.

In addition, the constitution, statutes, and case law require or suggest that certain provisions be contained in all state contracts and leases. First, A.R.S. §§ 35-214 requires the contractor to retain all books, data, and other records relating to the contract for a period of five years after completion of the contract. A.R.S. §§ 35-214 also requires language regarding retention and inspection of the contract records. Second, A.R.S. § 38-511 authorizes the cancellation of 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 agent for any other party to the contract during the period of time the contract or any extension of the contract is in effect. Similarly, if a person becomes a consultant to another party “with respect to the subject matter of the contract” it may be cancelled. Id.; see also Ariz. Att’y Op. I08-10. Next, nondiscrimination language is mandatory in government contracts. See Executive Order 2009-09, http://www.azgovernor.gov/dms/upload/EO_2009_09.pdf at 1-2. It is also important that all contracts and leases contain a clause that states that in the absence of specific legislative authority, such as nonlapsing appropriations or revolving funds, every payment obligation of the State under the contract is conditioned upon the availability of funds appropriated or allocated for the payment of such obligation. A provision outlining that the contract or lease is governed by the laws of the State of Arizona, including the Arizona Procurement Code, A.R.S. §§ 41-2501 to 41-2673, and the administrative rules promulgated thereunder, A.A.C. R2-7-101 to 2-7-1301, is also essential to all contracts and leases. Additional contract requirements include a certification that a contractor does not
have a “scrutinized business operation” in Sudan or Iran, A.R.S. §§ 35-391.06, -393.06, and warranties that the contractor is in compliance with all federal employment immigration laws and regulations, and is compliant with A.R.S. § 23-214(A), which mandates participation in the federal e-verify program.

The Attorney General should also review contracts and leases to determine if provisions regarding third-party antitrust violations and arbitration are necessary. A.R.S. § 12-1518. An addendum containing all of the statutorily required provisions should be kept on file.

The Assistant Attorney General assigned to represent an agency, or the chief counsel of the Administrative Law Section, should be consulted regarding review or drafting of major contracts and leases. Agencies are strongly encouraged to seek the assistance of the Attorney General in the early phases of significant contract procurements to avert potential problems. Upon review of the contract or lease, the Assistant Attorney General will sign a document stating that the agreement has been approved as to form.

Unless a contract or lease is exempt from review under A.R.S. § 41-790.01, the Department of Administration must review all architectural, engineering, and construction contracts before they are submitted to the Attorney General. A.R.S. § 41-791.01(A)(1). Consequently, the Attorney General will decline to review any contracts or leases that have not been reviewed by the Department of Administration, unless they are exempt from such review under A.R.S. § 41-790.01. All lease purchase agreements relating to land acquisition, capital projects, energy systems, or energy management systems should be submitted to the Attorney General for review to ensure that all the requirements of A.R.S. § 41-791.02(B) are provided for in the agreement. A.R.S. § 41-791.02 (D). Upon review, the Assistant Attorney General will sign a document stating that the agreement has been approved as to form.

Other statutes similarly require that certain agreements be reviewed by the Attorney General. See, e.g., A.R.S. §§ 15-2004(I)(4) (school facilities board lease purchase agreements); 41-1609(C) (contracts between Department of Corrections and federal and other state government agencies to accept and deliver inmates or administer corrections programs); 41-1958 (Department of Economic Security leases, lease-purchases and purchases of office space), 41-2813(C) (juvenile corrections contracts with other institutions for certain services).

Expenditures that are subject to the procurement code are explained in detail in Chapter 5.

1.7.2 Intergovernmental Agreements. Intergovernmental agreements are defined as contracts between two or more public agencies or public procurement units for services or for the joint exercise of any powers common to the agencies. A.R.S. § 11-952. The agencies may enter into agreements with one another for joint or cooperative action or may form a separate legal entity such as a nonprofit corporation. A.R.S. § 11-952(A).
Public agencies are defined to include “the federal government or any federal department or agency, Indian tribe, this state, any other state, all departments, agencies, boards, and commissions of this state or any other state, counties, school districts, cities, towns, all municipal corporations, and any other political subdivisions of this state or any other state.” A.R.S. § 11-951. Public procurement units are defined as “a local public procurement unit, the department [of Administration], any other state or an agency of the United States.” A.R.S. § 41-2631(4). Local procurement units are political subdivisions, their agencies, boards and departments or other instrumentalities, and “nonprofit corporation[s] created solely for the purpose of administering a cooperative purchase under” the state procurement code. A.R.S. § 41-2631(2).

Intergovernmental agreements are controlled by A.R.S. §§ 11-951 to -954. It is important to note that except for the right of joint exercise of powers granted in these statutes, no additional authority or power is conferred upon any public agency by way of the statutes controlling intergovernmental agreements. A.R.S. § 11-954. In other words, the statutes merely detail the method of entering into intergovernmental agreements and do not give any agency independent authority to act. Moreover, no intergovernmental agreement will relieve any public agency of any obligation or responsibility imposed upon it by law. A.R.S. § 11-952(C). In Myers v. City of Tempe, the Arizona Supreme Court assumed, without deciding, that one city’s fire department acting pursuant to an intergovernmental agreement could be considered an independent contractor of another city, but concluded that absent a duty imposed by the common law or a “statute, regulation, contract, franchise, or charter,” the contracting city could delegate its duty to the other city’s fire department. 212 Ariz. 128, 132-33, 128 P.3d at 755-56.

Intergovernmental agreements apply only to agreements involving the joint exercise of powers common to the contracting public agencies. A.R.S. § 11-952(A). 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. See Ariz. Att’y Gen. Ops. I86-084, I83-057. Therefore, where there is no joint exercise of powers common to the public agencies involved, there is no intergovernmental agreement and the statutory requirements of such do not apply. This will generally include the furnishing of services by one agency to another.

Prior to its execution, every intergovernmental agreement involving any public agency, board, commission, or public procurement unit is required to be submitted to the attorney of each agency or unit for review. A.R.S. § 11-952(D). When such an agreement is submitted, the Attorney General will determine “whether the agreement is in proper form and is within the powers and authority granted under the laws of this state to such public agency or public procurement unit.” Id. Thus, the agency should submit the intergovernmental agreement to the Attorney General for review before it is signed. The agency should also submit to the Attorney General copies of the agency’s action, by resolution or otherwise, that authorizes the future execution (signing) of the agreement. The Attorney General should receive an adequate amount of time to examine the copies of
the intergovernmental agreement and agency action in order to have an opportunity to review and propose necessary changes to the agreement.

The following is a checklist of the items the Attorney General requires for approval of intergovernmental agreements. Each agreement must:

A. Identify each public agency that is a contracting party by correct statutory title and indicate whether it is a state, town, or other public or municipal agency or instrumentality.

B. State in the recitals, or elsewhere in the agreement, the exact statutory references under which each contracting party is authorized to exercise the powers described in or required by the contract.

C. State the duration of the contract, preferably by specifying the beginning date and the ending date of the obligations.

D. State the purpose or purposes to be accomplished.

E. State the manner of financing the undertaking and, where applicable, the manner of establishing and maintaining a budget.

F. State the method or means of partial or complete termination.

G. Where property is to be acquired solely to accomplish the purpose or purposes of the agreement, provide a means for disposing of such property upon termination or completion of the agreement.

H. If a separate legal entity is formed, the agreement must include the precise organization, composition, title, and nature of the entity.

The governing board of the contracting agency must authorize the future execution (signing) of the agreement before it is submitted to the Attorney General. An agency head or board may not delegate the authority to sign an intergovernmental agreement unless the agency or board is specifically authorized by statute to delegate its contract-related duties. Ariz. Att’y Gen. Op. I80-092. Once the agreement is submitted to the Attorney General, the Attorney General will review it to ensure that the 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).

If the Attorney General determines that the agreement is “in proper form and is within the powers and authority granted” by law, A.R.S. § 11-952(D), this determination will be noted on the agreement. The Attorney General will then return the documents to the party who sent them. If the Attorney General determines that the agreement is not in the proper form or is not within the authority granted by law, all documents will be returned to the party.
who sent them with a letter noting the deficiencies. After the Attorney General has made a
favorable determination, the parties may then execute (sign) the agreement.

1.8 Investigative Services Within the Department of Law. Requests for
investigative assistance from the Attorney General’s Office concerning alleged criminal
misconduct should be directed, in writing, to the chief agent of the Special Investigations
Section or to the requesting agency’s assigned Assistant Attorney General, specifying in
detail the nature and scope of the investigation needed. The chief special agent will
evaluate the request to determine whether the Attorney General's Office is capable of
conducting the investigation and whether it would be appropriate for the Office to do so.
The person requesting the investigation will be notified of this decision.

1.9 Attorney General's Guidelines for Representing State Agencies.

1.9.1 Scope of the Attorney General's Duty to Represent State Agencies.
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. Thus, the constitution itself does not undertake to describe the duties of
the Office of the Attorney General, but instead assigns that task to the legislature. See

In carrying out that constitutional mandate, the Legislature has broadly prescribed
the duties of the Attorney General as the "chief legal officer of the state." A.R.S.
§ 41-192(A). The Attorney General's duties are found primarily in A.R.S. §§ 41-192 and
-193. Those statutes mandate that the Attorney General shall, for example, serve as legal
advisor to all state departments, A.R.S. § 41-192(A)(1), protect the civil rights of Arizona's
citizens in accordance with law, A.R.S. § 41-192(A)(7), and prosecute and defend in courts
of the State and the United States all proceedings to which the State or an officer thereof is
a party. A.R.S. § 41-193(A)(1). The legislature has also specifically authorized the
Attorney General to represent the State, its agencies, and its employees. See, e.g., A.R.S.
§ 41-621(M)(requiring Attorney General to represent and defend the State, its agencies
and employees for suits covered by the State's self-insurance program); see also Block,
189 Ariz. at 273-75, 942 P.2d at 432-34 (Attorney General authorized by A.R.S. § 35-212
to challenge any action involving the illegal expenditure of funds in state government and
by A.R.S. § 12-2041 to challenge the legality of any individual's exercise of authority as a
public officer).

With limited specific statutory exceptions, agencies other than the Attorney General
are forbidden from employing legal counsel or spending state monies for legal services.
A.R.S. § 41-192(D). Statutory exceptions have been created for the Director of Water
Resources; the Residential Utility Consumer Office; the Industrial Commission; the Arizona
Board of Regents; the Auditor General; the Corporation Commissioners and the
Corporation Commission (other than its Securities Division); the Governor's Office; the
Constitutional Defense Council; the Office of the State Treasurer; the Arizona Commerce
Authority; the Arizona Power Authority; the Department of Agriculture, under limited circumstances; the Arizona Health Care Cost Containment System Administration. See A.R.S. §§ 15-1626(A)(12), 36-2903(N), 40-106, 41-192(E), -192(G), and -192.01.

Additionally, if for any reason the Attorney General is unable to provide legal representation or services on behalf of a State agency in relation to any matter, the Attorney General shall give written notice to the agency affected. Receipt of such notice authorizes the agency, through the Attorney General, to hire attorneys to provide the necessary legal services. A.R.S. § 41-192(F).

Even with these exceptions, the Attorney General has a statutory mandate to perform the vast majority of the legal affairs required by State government. The Attorney General's broad responsibility to represent 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, 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 constitution and laws of the State. In this regard, the Attorney General is entrusted with protecting the public's interest while coordinating the legal affairs of a multitude of State agencies and agents.

Because the Attorney General is the chief legal officer of State government and the legal advisor to all State agencies and employees, it is inevitable that, from time to time, the Attorney General is 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. The Attorney General is called upon to participate as an advocate and also to act as an advisor to a hearing officer or decision making officer or body of the agency concerning evidentiary and procedural matters that may arise during the course of a proceeding. The Attorney General may also be required to originate civil or criminal enforcement actions against public officers for whom the Attorney General may also serve generally as legal counsel. Finally, the Attorney General may serve on a board or commission before which the Attorney General's Office is required to appear as an advocate.

The Arizona Rules of Professional Conduct (Ethical Rules) recognize the unique and varying roles of government lawyers and provide some general guidance to government attorneys who must serve diverse interests. For example, 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 intragovernmental 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.


The Ethical Rules also recognize that the government lawyer may represent a particular constituent agency or department, or the government as a whole. This principle is articulated in the Comment to ER 1.13, which discusses government lawyers’ ethical obligations when an organizational entity is the client:

The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or 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 relevant branch of government 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. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful 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 or regulation. This Rule does not limit that authority. See Scope. Government lawyers also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so.
The above factors define the obligations of the Office of the Attorney General. Representation guidelines based upon these combined resources are presented below.

1.9.2 Attorney General's Representational Role for the State, Its Agencies, and Employees.

1.9.2.1 Attorney General's Attorney-Client Relationship to the State, its Agencies, and Employees. As the attorney for the State, the Attorney General serves the people of Arizona and has the sworn obligation to uphold the State's constitution and laws. A.R.S. §§ 38-231 to -234. Although the State is a distinct legal entity, it cannot act except through its officers, employees, and other constituents. Ariz. Sup. Ct. R. 42, ER 1.13 & cmt. 1.

Those State officials and employees or other constituents are not, however, the individual clients of the Attorney General. Id. & cmt. 2. An employee's position within the agency does not create an attorney-client relationship between the employee and the Office of the Attorney General. If a representative of the Attorney General's Office provides an employee with legal advice concerning the employee's official duties, the communication is protected by attorney client confidentiality, but no individual attorney-client relationship arises between the individual employee and the lawyer. Id.

From time to time, however, the Attorney General may represent individual officers, employees, or other constituents in specific matters, so long as consent to such representation 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. Id., ER 1.13(g). This is consistent with A.R.S. § 41-192.02, which gives the Attorney General 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, or employee) consent to dual representation, the Attorney General will undertake the representation as 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 or employee. See Ariz. Sup. Ct. R. 42, ER 1.7. Public officials will be notified in writing of the Attorney General's decision regarding representation and will be informed that such dual representation will result in the disclosure to the State of information communicated by the public official to the Attorney General.

If before undertaking dual representation a good faith judgment cannot be made that an actual or apparent conflict does not exist, the State will, when appropriate, provide independent legal counsel to the individual public official or employee.
**1.9.2.2 Attorney-Client Privilege and Waiver of the Privilege.** The principle of lawyer-client confidentiality is given effect by related bodies of law including the attorney-client privilege and the rule of confidentiality established in professional ethics. Ariz. Sup. Ct. R. 42, ER 1.6, cmt. 3. The attorney-client privilege is a common law privilege, and in Arizona is codified in both the civil and criminal contexts. A.R.S. § 12-2234 (civil) and A.R.S. § 13-4062(2) (criminal). Confidentiality of information relating to the representation of a client, including communications between a lawyer and a client, is required by ER 1.6. Agencies, officers, and employees acting lawfully can expect that the Attorney General will maintain confidential communications. Ariz. Sup. Ct. R. 42, ER 1.6 & Comment 6.

Even where no attorney-client relationship is formed between an assistant attorney general and a State official, employee, or other organizational constituent, communications with State officials and employees are covered by ER 1.6 confidentiality, and also are protected by the attorney-client privilege. See ER 1.13, cmt. 2. Communications between an attorney for a governmental entity and any employee, agent or member of the entity regarding acts or omissions of or information obtained from the employee, agent or member is privileged if the communication is either 1) for the purpose of providing legal advice to the entity or employer or to the employee, agent or member; or 2) is for the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member. A.R.S. § 12-2234. The privilege belongs to the State, and not the individual. See Samaritan Foundation v. Goodfarb, 176 Ariz. 497, 504, 862 P.2d 870, 877 (1993) (“In the corporate context, the privilege belongs to the corporation and not the person making the communication.”).

Generally, the State may assert a privilege over communications between a representative of the Attorney General's Office and the State's officials or employees. Because the official or employee who obtains legal advice from the State's lawyers on behalf of the State or agency of the State is not the "client," the privilege belongs to the State, and no individual attorney-client privilege may be asserted by the employee. Other situations, however, may arise. The Arizona Court of Appeals has held that where a city ordinance provided that the city attorney also represents individual city officers in “matters relating to their official . . . duties,” city council members could assert the privilege. See State ex rel Thomas v. Schneider, 212 Ariz. 292, 296, 130 P.3d 991, 995 (App. 2006). Section 13-4062(2) does not “exclude communications made to government attorneys that would otherwise fall within the privilege.” Id. at 297, 130 P.3d at 996.

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. Also, prior communications between a State officer or employee and a lawyer from the Attorney General's Office do not prevent that lawyer or any other lawyer from the Attorney General's Office from subsequently cross-examining that person.
The issues of (1) preserving communications between a public official or employee and the Attorney General as confidential and (2) asserting or waiving the attorney-client privilege are to be determined on the basis of the best interests of the State as the represented client. Ariz. Sup. Ct. R. 42, ER 1.6. Legal communications between the Attorney General and its agencies and employees regarding official business of the State should not be disclosed to private parties without prior consultation with the Attorney General. Failure by an agency and employee to first seek approval of the Attorney General before disclosing confidential legal communications to third parties can jeopardize the interests of the State. Furthermore, disclosure of confidential government information also may violate A.R.S. § 38-504(B), and could subject the employee to penalties. See A.R.S. § 38-510.

In all criminal and enforcement matters 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 public agency as to the best interests of the State as a whole, the Attorney General will present the matter to the Governor for review and resolution.

1.9.2.3 Agency Requests for Actions or Defenses That Are Not Legally Supportable or Are Interposed for Delay. If an agency, officer, or employee proposes to pursue an action or maintain a defense that the Attorney General determines is not legally supportable or has no substantial purpose other than delay, the Attorney General's Office will advise the agency of that fact and the Attorney General will not pursue the action or defense on the agency's behalf. The applicable Ethical Rules, which provide that no lawyer may assert or controvert an issue where the issue or its defense is frivolous or otherwise legally unsupportable, preclude the Attorney General from pursuing such claims or defenses. Ariz. Sup. Ct. R. 42, ER 3.1; see also Ariz. Sup. Ct. R. 41. If an agency, officer, or employee wishes to pursue an action or maintain a defense that the Attorney General determines is not legally supportable or has no substantial purpose other than delay, the agency will not be entitled to public representation on that matter.

1.9.2.4 Adverse Interests Other Than Enforcement Actions. When the Attorney General has interests adverse to those of another State agency, officer, or employee in a matter not involving illegal conduct or other enforcement activity (see Section 1.9.2.5), the Attorney General will not represent the agency or employee on the matter in controversy but may instead appoint outside counsel to provide representation in the specific matter. Sections 1.9.5 through 1.9.5.4 provide guidance on retention and control of outside counsel. The Attorney General will continue, however, to represent the agency or employee in all other matters, as required by law.
1.9.2.5 Illegal Activity or Other Action Requiring Enforcement Actions Against State Officials. Representatives of the Attorney General’s Office owe a fiduciary duty to the State of Arizona as the client and not to an individual official or employee. ER 1.13. There is, therefore, no inherent conflict of interest for the Attorney General to enforce civil or criminal laws against State officials. See generally United States v. Troutman, 814 F.2d 1428, 1438-39 (10th Cir. 1987); State v. Klattenhoff, 801 P.2d 548, 552 (Haw. 1990) (holding that Attorney General “may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the AG can be assigned in such a manner as to afford independent legal counsel and representation in the criminal matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented”). Instead, the Attorney General has a duty on behalf of the State to investigate and take appropriate action if there is any claim of illegal acts by state officers or employees. See, e.g., Block, 189 Ariz. at 273-75, 942 P.2d at 432-34 (Attorney General authorized to take action on behalf of State pursuant to A.R.S. § 35-212 to challenge any action involving the illegal expenditure of funds in state government and by A.R.S. § 12-2041 to challenge the legality of any individual's exercise of authority as a public officer); see also Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003) (explaining that the Ethical Rules do not bar Attorney General from filing suit against another executive branch officer because “the Attorney General must consider the broader institutional concerns of the state”).

The Attorney General may investigate and civilly or criminally prosecute any State official or employee who has committed or intends to commit an improper or illegal act. This issue may arise in several contexts. For example, the Attorney General is responsible for ensuring that the correct individual is holding public office. A.R.S. § 12-2041 (quo warranto statute). The Attorney General is also responsible for preventing the illegal payment of State money. A.R.S. § 35-212(A). The Attorney General also enforces the Open Meeting Law. A.R.S. § 38-431.07(A).

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. Ariz. Sup. Ct. R. 42, ER 1.13(b). These principles are embodied in the Comment to ER 1.13 which, in part, provides:

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.


The Attorney General is not authorized to represent or appoint outside counsel for state entities or employees to defend a purely criminal proceeding. See generally, A.R.S. §§ 41-192, -192.02 and -193. If a civil action is brought against a State employee in the employee's individual capacity, the Attorney General has discretion to represent the employee, but only until such time as it is established as a matter of law that the alleged activity or events involved were not performed, or directed to be performed, in the course and scope of the employee's duty or employment. A.R.S. § 41-192.02. Thus, if the Attorney General is contemplating instituting or has instituted civil or criminal proceedings against a state agency, public official, or employee, the agency, public official or employee may not be entitled to public representation, unless such representation is otherwise expressly allowed by law.

1.9.3 Multiple Representation of State Agencies.

1.9.3.1 Scope of Section. To the extent resources are available, the Attorney General is obligated to represent all state agencies in all matters. A.R.S § 41-192(A)(1). The only exceptions are those agencies expressly exempt from such representation by statute. A.R.S. § 41-192(E). See Section 1.9.1 (listing exempt agencies). In representing state agencies, the Attorney General must serve several roles, providing advice in non-judicial proceedings, representation in quasi-judicial proceedings, and representation in court. The following sections provide guidelines for situations where the Attorney General is faced with conflicting interests among different agencies in these statutorily mandated roles.

1.9.3.2 Advice in Non-Judicial Proceedings. When two or more state agencies have adverse interests and the dispute between the agencies is not part of a pending judicial or quasi-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 to 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 only through the Attorney General. The principles set forth in Sections 1.9.5 through 1.9.5.4 govern the appointment of outside counsel.
1.9.3.3 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 of both by the Attorney General. In that case, the Attorney General shall continue to represent all consenting agencies. Continued representation of both agencies will be provided by different Assistant Attorneys General in accordance with the principles for adjudicatory proceedings identified in Section 1.9.3.4. If both agencies do not consent, the Attorney General will decide which agency to represent and the other agency may obtain outside legal counsel through the Attorney General. The principles set forth in Sections 1.9.5 through 1.9.5.4 govern the appointment of outside counsel.

1.9.3.4 Judicial Proceedings. The Arizona Supreme Court has determined that the Attorney General has both the power and the duty to initiate court action on behalf of the State when necessary to prevent the illegal expenditure of state funds, or to challenge the illegal exercise of a public office. Block, 189 Ariz. at 273-75, 942 P.2d at 432-34. A different problem is posed, however, when the Attorney General is asked to represent two separate agencies that have a judicial dispute. The Arizona Supreme Court has stated that where the Legislature has expressly authorized one or both of the agencies to bring the dispute before the judicial branch for resolution, the contesting agencies are in control of the decision to do so. State ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 197, 124 P.2d 768, 774 (1942). When this occurs, the Attorney General must decide how to provide the necessary legal representation.

There have been rare cases in the history of Arizona where two Assistant Attorneys General appeared in court on behalf of opposing agencies. See, e.g., State ex rel. Conway v. Hunt, 59 Ariz. 256, 126 Ariz. 303 (1942), vacated on rehearing on other grounds, 59 Ariz. 312, 127 P.2d 130. In Ariz. State Land Department v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960), the Supreme Court seemed to approve of this practice, stating that the Attorney General may appear through his assistants to represent both agencies even "where two agencies of the State assert contrary positions on an issue presented to a court for decision." 87 Ariz. at 145, 348 P.2d at 916 (citing State ex rel. Conway). McFate is consistent with the decision of the Connecticut Supreme Court in Connecticut Comm’n on Special Revenue v. Connecticut Freedom of Information Comm’n, 387 A.2d 533 (Conn. 1978). In that case, two assistant attorneys general represented appellant and appellee state agencies, which took conflicting positions on the issue before the court. The Connecticut Supreme Court rejected the lower court's conclusion that such dual representation violated the Code of Professional Responsibility (the predecessor to the Rules of Professional Conduct). Noting the unique role of the attorney general as the State's attorney, the court noted:

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 [of the Code of Professional Responsibility] 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 [the state agencies] 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 appearances for the separate agencies entered by assistant attorneys general particularly assigned as counsel for the separate agencies.

387 A.2d at 537-39 (citations omitted). See also Environmental Protection Agency v. Pollution Control Bd., 372 N.E.2d 50, 53 (Ill. 1977) ("The Attorney General's responsibility is not limited to serving or representing the particular interests of State 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."); but see People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1207 (Cal. 1981) (stating no "constitutional, statutory, or ethical authority" exists to permit attorney general to advise clients “with regard to pending litigation, withdraw, and then sue the same clients the next day on a . . . cause of action arising out of the identical controversy").

In Land Department v. State ex rel. Herman, 113 Ariz. 125, 126 n.*, 547 P.2d 479, 480 n.* (1976), however, the Supreme Court appeared to disapprove the practice of the Attorney General representing two State agencies on opposite sides of a controversy:

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 Dep't of Admin., 111 Ariz. 279, 528 P.2d 623 (1974). 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.

Thus, in only the rarest case will the Attorney General represent two State agencies in judicial proceedings when the agencies are on opposite sides of the litigation. Instead, in cases where two agencies are in opposition in a court proceeding, the Attorney General will determine which to represent and withdraw from representation of the other agency, if ethically appropriate. If the Attorney General determines that he or she ethically cannot withdraw representation from one agency and continue to represent the other agency, then he or she will withdraw from representation of both. Agencies that will not be represented by the Attorney General may obtain outside counsel in accordance with Sections 1.9.5 through 1.9.5.4.
Only in an exceptional circumstance, and only after both agencies have consented to continued representation, will the Attorney General consider authorizing Assistant Attorneys General to continue to represent multiple State agencies that are on opposite sides of a dispute in a judicial proceeding. In those situations, safeguards may be implemented, including requesting approval from the court for dual representation and providing representation through Assistant Attorneys General in different sections of the office.

1.9.4 Agency Adjudicatory Proceedings.

1.9.4.1 Scope of Section. Many agencies, boards, and department heads regularly advised by the Attorney General may also become decision makers in quasi-judicial administrative proceedings. This role is more fully discussed in Chapter 10. In such situations, the Assistant Attorney General who provides day-to-day legal advice to the agency, board, or department head often becomes an advocate on behalf of the "Agency" and must present arguments asking the decision maker to take some action. In such a situation, the same Assistant Attorney General cannot also render impartial legal advice to the decision maker regarding the proceeding. Yet, the Attorney General's Office must provide such advice if it is needed by the decision maker. This Section is designed to provide guidance on how that advice will be provided.

1.9.4.2 Advocate. An Assistant Attorney General participating as an advocate in a proceeding before an administrative tribunal cannot serve as an advisor to the tribunal respecting that proceeding. Taylor v. Arizona Law Enforcement Merit Sys., 152 Ariz. 200, 206, 731 P.2d 95, 101 (App. 1986). 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. See Section 1.9.4.10.

1.9.4.3 Selection of Advisor. If an agency decision maker 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's Office. The Solicitor General will designate a qualified assistant from either the Solicitor General's Office or another section, except the section 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. This procedure was discussed by the Arizona Court of Appeals in Taylor, as an appropriate method for avoiding a conflict that would "arise if the same Assistant Attorney General participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter." 152 Ariz. at 206, 791 P.2d at 101.

1.9.4.4 Participation in Preliminary Matters. During the course of the Attorney General's representation of an agency, an Assistant Attorney General may advise an agency concerning investigative matters, including whether the agency has grounds to commence a formal action. If an action is commenced, the same Assistant Attorney
General who gave advice on such preliminary matters may, and usually will, act as the advocate, but shall thereafter refrain from discussing the specific matter with the decision maker in any role except that of advocate. See Section 1.9.4.6. The advisor cannot participate in such preliminary matters, except as permitted in Section 1.9.4.7.

1.9.4.5 Prohibition on Communication Between the Advocate and Advisor. No ex parte communication shall occur between the advisor appointed by the Solicitor General 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 legal issue on behalf of any party participating in the proceeding.

1.9.4.6 Limitations on Advocate. The advocate shall not participate in the actual determination by the decision maker of any fact or legal issue in dispute, nor may the advocate have any ex parte communications with the decision maker regarding the merits of the case. The advocate may, however, submit written proposed findings of fact or a proposed decision to the decision maker provided that the decision maker is free to accept, modify, or reject the proposed findings or decision and copies are promptly provided to all adverse parties or their respective counsel to enable them to respond.

1.9.4.7 Limitations on Advisor. The advisor shall limit his or her participation to providing the decision maker with advice on procedural matters, including questions concerning the admission or exclusion of evidence. If the decision maker requests 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 all advocates and participating parties through written memoranda or oral arguments during the course of the proceeding. The advisor should not advise the decision maker how to resolve substantive legal or factual issues.

1.9.4.8 Disregard of Advice. If the decision maker takes action contrary to the argument presented by the parties, or to the legal advice of the advisor, the Attorney General shall respect the independent judgment of that officer or tribunal.

1.9.4.9 Judicial Review. If a party challenges an administrative decision in superior court pursuant to the Administrative Review Act, A.R.S. § 12-901 to -914, the Attorney General normally represents the decision maker and defends the administrative action taken. However, if the agency acted in a manner that causes the Attorney General to conclude that it cannot represent the decision maker, the Attorney General will decline to represent the agency. See Section 1.9.2.3.

Arizona Court of Appeals indicated in the *Taylor* case that an Assistant Attorney General may act as an advocate and another Assistant Attorney General from a different section may serve as advisor in a case. 152 Ariz. at 206, 731 P.2d at 101.

The courts have acknowledged, however, that such a combination possesses "the potential" for unfairness. In order to perform the required statutory duties and to ensure a fair proceeding, all Assistant Attorneys General must adhere to the guidelines in Sections 1.9.4.1 - 1.9.4.8 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. These guidelines are consistent with the Attorney General's ethical restrictions and also serve to prohibit ex parte communications with judges and other officials of a tribunal. See Ariz. Sup. Ct. R. 42, ER 3.5(b).

1.9.5 **Agency Representation by Outside Counsel.**

1.9.5.1 **Authority to Proceed.** Before a non-exempt agency or individual acts to obtain outside counsel, the Attorney General will first determine whether legal authority exists to require legal representation independent of the Attorney General. If it does, the following guidelines will apply.

1.9.5.2 **Available Funds.** If an agency will incur an obligation to pay for legal services, it must have both the authority to expend funds for this purpose and available funds. The agency should transfer funds for the payment of outside legal counsel to the Attorney General, who will reimburse outside legal counsel on behalf of the State.

1.9.5.3 **Appointment.** In accordance with the State's procurement laws, the State annually receives bids from attorneys desiring to provide the State with outside counsel. If outside counsel is required by a state agency or employee that is not exempt from Attorney General representation, the choice of outside counsel must be made from the list of successful bidders. The Attorney General, or the Attorney General's designees, shall select outside counsel. In no case shall outside counsel be given a contract to perform services on behalf of the State or its non-exempt agencies without the Attorney General's approval. A.R.S. § 41-2513(B).

1.9.5.4 **Control of Appointed Counsel.** Once outside counsel is obtained for the cases described in this Chapter, outside counsel will exercise independent professional judgment in the handling of the case.

1.9.6 **Attorney General's Membership on Quasi-Judicial Public Entities.**

1.9.6.1 **General Rule.** The Attorney General will generally recuse himself from participation as a member of a board, commission, or other public entity that functions as an administrative tribunal or in a quasi-judicial capacity in any proceeding in which an Assistant Attorney General participates as an advocate.
1.9.6.2 Issues of Compelling Public Interest. If the Attorney General determines that participation in a particular proceeding before a board, commission, or other public entity upon which he or she serves is of compelling public interest, he or she may elect not to recuse him or herself from participating in the matter. In such a case, the board, commission, or public entity may obtain outside counsel through the Attorney General to represent it in the matter. The principles in Sections 1.9.5 through 1.9.5.4 will apply in these circumstances.
## CHAPTER 2
PUBLIC OFFICERS AND EMPLOYEES

### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>Scope of this Chapter</td>
</tr>
<tr>
<td>2.2</td>
<td>Definition of &quot;Public Officer&quot;</td>
</tr>
<tr>
<td>2.3</td>
<td>Qualifications for Public Office</td>
</tr>
<tr>
<td>2.4</td>
<td>Duties and Responsibilities of Public Officers</td>
</tr>
<tr>
<td>2.5</td>
<td>Nomination and Appointment</td>
</tr>
<tr>
<td>2.5.1</td>
<td>Nomination Requiring Senate Consent</td>
</tr>
<tr>
<td>2.5.1.1</td>
<td>Term of Office Begins or Expires or Office Becomes Vacant During Regular Session of the Legislature</td>
</tr>
<tr>
<td>2.5.1.2</td>
<td>Term of Office Begins or Expires or Office Becomes Vacant While Legislature is Not in Regular Session</td>
</tr>
<tr>
<td>2.5.1.3</td>
<td>Tenure of Nominee and Officer</td>
</tr>
<tr>
<td>2.5.2</td>
<td>Nomination and Appointment of Other Officers</td>
</tr>
<tr>
<td>2.6</td>
<td>Loyalty Oath</td>
</tr>
<tr>
<td>2.7</td>
<td>Term of Office</td>
</tr>
<tr>
<td>2.8</td>
<td>Vacancy in Office</td>
</tr>
<tr>
<td>2.9</td>
<td>Resignation from Office</td>
</tr>
<tr>
<td>2.10</td>
<td>Expiration of Term</td>
</tr>
<tr>
<td>2.11</td>
<td>Impeachment of Officers</td>
</tr>
<tr>
<td>2.12</td>
<td>Deputies and Assistants</td>
</tr>
</tbody>
</table>
Section 2.13 Compensation and Salaries

Section 2.14 The Sunset Law

Section 2.15 Selected Criminal and Civil Liability Provisions
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 appointment, tenure in office, and civil or criminal liability are also discussed. See also Chapter 3 (Personnel).

2.2 Definition. 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, other than clerks or mere employees of the officer." A.R.S. § 38-101(3). The executive heads of all state agencies and the members of all state boards and commissions are considered "public officers." Generally, all others working for the state are “employees.”

2.3 Qualifications for Public Office. Persons seeking election to public office must meet Arizona constitutional and statutory requirements. A person is not eligible for elective State office unless he or she is a qualified elector of the political division or municipality in which such person is elected. Ariz. Const. art. VII, § 15. A person who is adjudicated an incapacitated person is not a qualified elector, nor is any person convicted of treason or of a felony, unless restored to civil rights. Id. § 2(c).

Public officers, whether elected or appointed, must be at least eighteen years old, United States citizens, and residents of Arizona, and must have registered with the selective service system if required by law to do so. A.R.S. §§ 38-201(A), (D), (E). In addition, constitutional or statutory provisions establish 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. Public officers must impartially execute all laws and rules for which they are 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.
Public officers, therefore, must familiarize themselves with laws and rules relating generally to the duties and responsibilities of public officers as well as those pertaining to their particular offices and agencies. Public officers are obligated to discharge the duties of their offices and may not delegate those duties to subordinates unless authorized by law. See Section 2.12. See Chapter 13 for a discussion of state officer and employee liability, immunity, and indemnity.

2.5 Nomination and Appointment of Appointive Officers. The method for nomination and appointment of appointive officers is usually set forth in the statutes pertaining to the office. 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 (A.R.S. § 36-102(C)), the State Land Commissioner (A.R.S. § 37-131(B)), the Director of Insurance (A.R.S. § 20-141(A)), the Real Estate Commissioner (A.R.S. § 32-2106(A)), the Registrar of Contractors (A.R.S. § 32-1103), and the Racing Commissioners, (A.R.S. § 5-102). Some public officers may be appointed by the Governor with the consent of the Senate, but not pursuant to A.R.S. § 38-211. The Director of the Department of Administration (A.R.S. § 41-701(C)) and the Director of Economic Security (A.R.S. § 41-1952(C)) are examples. Other public officers are appointed by the Governor without senate approval. Examples of such officers include the members of the Board of Accountancy (A.R.S. § 32-702(B)), the Board of Barbers (A.R.S. § 32-302(A)), and the Board of Cosmetology (A.R.S. § 32-502(A)). 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(A).

2.5.1 Nomination and Appointment of Officers Who Are Appointed Pursuant to A.R.S. § 38-211. When a statute provides that an "officer shall be appointed pursuant to [A.R.S. § 38-211], the [G]overnor shall nominate and with the consent of the [S]enate appoint such officer as prescribed in [that] section." A.R.S. § 38-211(A).

2.5.1.1 Term of Office Begins or Expires or Office Becomes Vacant During Regular Session of the Legislature. When a "term of any state office which is appointive pursuant to [A.R.S. § 38-211] expires, begins or becomes vacant during a regular legislative session, the [G]overnor [must nominate a qualified person during that session] and . . . promptly transmit the nomination to the [P]resident of the [S]enate." A.R.S. § 38-211(B). If an office is occupied by an incumbent who is capable of continuing to serve until the Senate has consented to a nomination, a nominee shall not assume the duties of the office, pending Senate confirmation. Id. "If the incumbent is unable to continue to discharge the duties of office, the nominee shall assume and discharge the duties of the office pending [S]enate confirmation." Id.

"If the [S]enate consents to the nomination, the [G]overnor shall then appoint the nominee to serve for the term or, in the case of a vacancy, for the unexpired term in which the vacancy occurred." Id. If the Senate rejects a nomination, the Governor shall not appoint the rejected nominee and must promptly nominate another qualified person. Id.
If the Senate does not act on a nomination made during the regular session, the nominee may discharge the duties of the office subject to confirmation during the next legislative session. *Id.* In addition, if the Governor fails to nominate a person or the Legislature fails to receive a nomination during the session, for an office that becomes vacant or a term that began or ended during a regular session, the Governor shall appoint a nominee after the close of the legislative session to discharge the duties of the office subject to confirmation during the next legislative session. *Id.* This provision was added by the Legislature in 1989 and seems to contradict the earlier provision in A.R.S. § 38-211(B) requiring the Governor to nominate a person during the regular session. 1989 Ariz. Sess. Laws Ch. 250, § 4. This amendment, however, has not yet been construed by the Arizona courts.

### 2.5.1.2 Term of Office Begins or Expires or Office Becomes Vacant While Legislature is Not in Regular Session.

"If the term of any state office . . . expires, begins, or becomes vacant . . . when the Legislature is not in regular session, the [G]overnor shall nominate a [qualified] person . . . for such office." A.R.S. § 38-211(C). The nominee shall assume the duties of the office until the Senate either rejects or fails to act on the nomination. *Id.* The Governor "shall transmit the nomination to the [P]resident of the [S]enate during the first week of the next regular session." *Id.*

### 2.5.1.3 Tenure of Nominee and Officer.

A nominee shall not "serve longer than one year after nomination without [S]enate consent." A.R.S. § 38-211(E). An incumbent who is re-nominated to the same office is also limited to one year from the date of re-nomination without Senate confirmation. Ariz. Att'y Gen. Op. I00-014. "Every officer who is subject to [Senate] confirmation [under A.R.S. § 38-211] and whose term is not fixed by law shall hold office at the pleasure of the appointing power." A.R.S. § 38-211(D).

### 2.5.2 Nomination and Appointment of Other Officers.

As previously noted, a number of officers are to be appointed by the Governor, subject to Senate confirmation, but are not appointed pursuant to A.R.S. § 38-211. A.R.S. § 38-295 provides that these other appointees’ offices are also covered by the provisions of A.R.S. § 38-211.

### 2.6 Loyalty Oath.

In Arizona, a loyalty oath is required of officers and employees of all government agencies. A.R.S. § 38-231(E); see Ariz. Att'y Gen. Op. I86-020. "[O]fficer or employee" is defined for this purpose as "any person elected, appointed or employed, either on a part-time or full-time basis, by this 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 county, city, town, municipal corporation, school district or public educational institution." A.R.S. § 38-231(F).
The loyalty oath provides 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)

Id. § (E). Any person who fails to take and execute the loyalty oath may not receive compensation, A.R.S. § 38-231(B), and is deemed to have vacated the office, A.R.S. § 38-291(9). A person who exercises the duties of public office without first taking the oath is guilty of a class 2 misdemeanor. A.R.S. § 38-442(A).

An officer or member of a board or commission must take, subscribe, and file the loyalty oath "[i]f appointed, at or before commencement of the term of office," or "if elected, at any time after receiving the officer’s certificate of election, and at or before commencement of the term of office." A.R.S. § 38-232.

The loyalty oath of an elected officer must be filed with the Secretary of State. The oaths of other state officers and employees must be filed with the office of the employing state board, commission or agency to which they have been appointed or for which they work. A.R.S. § 38-233(A).

2.7 Term of Office. Many public officers have terms of office specified by law, most often running from two to five years. When the term of an appointive office has not been established by law, the officer holds the position at the pleasure of the appointing authority. A.R.S. §§ 38-211(D), -295(A).

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

1. The public officer dies, is judicially determined to be insane, resigns and the resignation is accepted, is removed from office, ceases to be a resident of the state or locale for which he was elected, or is convicted of a felony or of an offense involving his official duties. A.R.S. § 38-291(1)-(5), (8).

2. The public officer is absent from the state without legislative permission for more than three consecutive months, ceases to discharge the duties of the office for three consecutive months, fails to file the required oath or bond on
time, or violates the restrictions imposed by A.R.S. § 38-296 (Arizona’s "resign-to-run" statute). A.R.S. § 38-291(6), (7), (9), (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. For an office subject to A.R.S. § 38-211, when the Senate rejects the nomination or fails to act on the nomination within one year of its submission to the Senate. See, e.g., A.R.S. § 38-211(E).

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.

2.9 Resignation from Office. An appointive officer seeking to resign from office must deliver a written resignation to the appointing authority. A.R.S. § 38-294(7). The resignation is not effective until accepted by the appointing authority. A.R.S. § 38-291(3). If the appointing authority does not accept the resignation, the officer must continue to discharge the duties of the office until his successor is qualified. See Cragin v. Frohmiller, 43 Ariz. 251, 256-257, 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). "The resignation of the incumbent elective officer duly filed in writing . . . shall, if not accepted within ten days, be deemed to have become effective as of the date of filing." A.R.S. § 38-296(C) (emphasis added). If an officer resigns and the resignation is accepted or becomes effective before the expiration of the term, an officer who is appointed to fill the vacancy may serve only for the remainder of the unexpired term. A.R.S. § 38-295(C).

2.10 Expiration of Term. Except as provided in A.R.S. § 38-211 for an officer whose appointment is subject to Senate confirmation, an officer is required to continue to discharge the duties of the office after the expiration of the term of office, until a successor has qualified. A.R.S. § 38-295(B).

2.11 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.

2.12 Deputies and Assistants. Public officers may appoint deputies and assistants only when specifically authorized to do so by law. A.R.S. § 38-461(A). The appointment must be in writing and filed with the Secretary of State. A.R.S. § 38-461(C). "Unless otherwise provided [by law], each deputy . . . possesses the powers and may perform the duties prescribed by law for the office of the principal." A.R.S. § 38-462. Public officers "may appoint clerks and employees for the prompt discharge of the duties of the office." A.R.S. § 38-461(A).
2.13 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 the officer's term of office, except that the compensation for officers serving on boards composed of two or more officers whose terms are not coterminous may be increased. Ariz. Const. art. IV, pt. 2, § 17. When the salary of one member of such a board is adjusted legislatively at the beginning of a 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 set forth in the Department of Administration salary plan as adopted or modified by the Legislature. A.R.S. § 38-611(B). If exempt from the state personnel system, state officers and employees receive salaries within the range recommended annually by the Department of Administration to the Legislature and the Joint Legislative Budget Committee. A.R.S. § 38-611 (A). Some members of boards, commissions, councils, or advisory committees may receive compensation at a rate not to exceed $30 for each day they serve. A.R.S. § 38-611(D). Certain state officers and employees are exempt from the foregoing compensation provisions. See A.R.S. § 38-611(C).

2.14 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 their existence. A.R.S. §§ 41-2951 to 41-2958. The Auditor General and committees of the Legislature conduct a "sunset review" of each administrative agency scheduled for termination. 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. § 41-2952(5). Unless specific legislation is enacted to continue the agency or modify its structure, the agency ceases to exist on the scheduled termination date. A.R.S. § 41-2955. The scheduled termination dates for agencies may be found in A.R.S. Title 41, chapter 27, article 2. A termination schedule is added by the Legislature each year.

2.15 Selected Criminal and Civil Liability Provisions. Public officers and employees should be familiar with certain criminal and civil liability provisions that may be relevant to their activities. See generally Chapters 8 (Conflict of Interest), 13 (Litigation Against State Entities or Employees), and 14 (Detection of Criminal Violations). 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; Section 14.3.5.

2. **Impersonating a public servant.** | Class 1 misdemeanor
   Pretending to be a public servant with intent to induce another to submit to the actor's pretended official authority or to rely on his or her pretended official acts. A.R.S. § 13-2406; Section 14.3.5.

3. **Tampering with a public record.** | Class 6 felony
   Knowingly, with intent to defraud or deceive, preparing, altering, using, or filing a false written instrument as a public record; destroying, removing, mutilating, or concealing public records; or refusing to deliver a public record after a proper request has been made. A.R.S. § 13-2407; Section 14.3.5.

4. **Bribery.** | Class 4 felony
   Conferring a benefit on a public servant, with corrupt intent, "to influence the public servant's . . . vote, opinion, judgment, exercise of discretion or other action in his official capacity;" or the solicitation or acceptance by a public servant, with corrupt intent, 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; Section 14.3.6.

5. **Trading in public office.**

Offering, conferring or agreeing to confer, with corrupt intent, a benefit upon a public servant in exchange for appointment, or nomination as a candidate to a public office, or soliciting or agreeing, with corrupt intent, to accept any benefit in exchange for appointing or nominating another to a public office. A.R.S. § 13-2603; Section 14.3.6.

6. **Perjury.**

Making a false sworn statement or false unsworn declaration, certificate, verification or statement subscribed to be true under penalty of perjury, believing it to be false, in regard to an issue that could have affected the course or outcome of any proceeding or transaction. A.R.S. § 13-2702; Section 14.3.7.

7. **False swearing.**

"Making a false sworn statement, believing it to be false." A.R.S. § 13-2703; Section 14.3.7.

8. **Unsworn falsification.**

Knowingly making a "statement which he believes to be false, in regard to [an issue that could have affected the course or outcome of any proceeding or transaction], to a public servant in connection with an

Class 6 felony

Class 4 felony

Class 6 felony

Class 2 misdemeanor (false application)

OR

Class 1 misdemeanor (false statement in connection with official proceeding)
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; Section 14.3.7.

9. **Tampering with a witness.**  
   Class 6 felony

   Knowingly inducing a witness or person who may be called as a witness to unlawfully withhold testimony, testify falsely, or be absent from an official proceeding to which the witness has been legally summoned. A.R.S. § 13-2804.

10. **Liability for failure to collect fees.**  
    Civil liability

   Neglecting or failing to collect fees for licenses, permits, certificates, or other monies due a budget unit at the time such licenses, permits, and certificates are issued, or services rendered. A.R.S. § 35-143.

11. **Liability for unauthorized obligations.**  
    Civil liability

   Incurring, ordering, or voting for "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.

12. **Illegal withholding or expenditure of state monies.**  
    Civil liability, plus 20% penalty

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

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

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

15. **Influencing, obstructing, or impairing an audit.**

"[W]ith intent to defraud or deceive, improperly influenc[ing], obstruct[ing], or impair[ing] an audit being conducted or about to be conducted . . . in relation to any contract or subcontract with the state." A.R.S. § 35-215; Section 14.3.3.

16. **Violation of duties of custodian of public monies.**

Misappropriating public monies for loans or personal use, or otherwise misusing public monies in the custodian's safekeeping. A.R.S. § 35-301.

17. **Violation of loyalty oath.**

Knowingly acting to overthrow, or advocating the overthrow by force or violence or terrorism of state or local governments or becoming or remaining a member of the
18. **Usurpation of office.**

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

19. **Withholding or destroying public records or property.**

Knowingly withholding, detaining, mutilating, destroying or taking away property of an office from the lawful successor or other person entitled to the property. A.R.S. § 38-363.

20. **Charging excessive fees.**

Demanding and receiving a higher fee than prescribed by law or any fee not established by law. A.R.S. § 38-413; Section 14.3.8(2).

21. **Failing to report amount collected.**

Knowingly failing to report fees or other monies collected or to file required statement. A.R.S. § 38-414; Section 14.3.8(3).

Class 2 misdemeanor

Class 4 felony

Class 5 felony (Civil liability, four times fee)

Class 2 misdemeanor (Removal from office)
22. **Stealing, destroying, altering, or secreting public records.**

Stealing, or knowingly and without lawful authority destroying, mutilating, defacing, altering, falsifying, removing, or secreting all or part of any public record, or permitting any other person to do so. A.R.S. § 38-421; Section 14.3.5.

Class 4 felony
(Public officers)

Class 6 felony
(Persons other than public officers)

23. **Making or giving a false certificate.**

Making or giving as true a certificate or writing containing a statement known by the maker to be false. A.R.S. § 38-423.

Class 6 felony

24. **Acting as a public officer without qualifying.**

"Exercis[ing] a function of a public office without taking the oath of office, or without giving the required bond." A.R.S. § 38-442.

Class 2 misdemeanor

25. **Nonfeasance in public office.**

Knowingly omitting to perform any duty required of one's office by law. A.R.S. § 38-443; Section 14.3.8(1).

Class 2 misdemeanor, unless special provision for punishment has been made

26. **Asking or receiving illegal gratuity or reward.**

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

Class 6 felony
27. **Violation of conflict of interest prohibition.**

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; see Sections 8.2, 8.16.1 - 8.16.3.

28. **Purchase of appointment.**

"[K]nowingly giv[ing] or offer[ing] any gratuity or reward in consideration that he, or any other person, be appointed to a public office, or permitted to exercise or discharge the duties [of such office]." A.R.S. § 38-465.

29. **Sale of appointment to office.**

Appointing or permitting another to exercise or discharge any duties of the public office in exchange for a gratuity or reward. A.R.S. § 38-466.

30. **Unlawful employment of relatives.**

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(A).

31. **Violating conflict of interest provisions.** See Chapter 8 Sections 3.9.2, 14.3.8(5).

Intentionally or knowingly violating conflict of interest provisions, A.R.S. §§ 38-503 to -505. A.R.S. § 38-510(A), (B).
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>32.</td>
<td><strong>Liability for payment to disqualified persons.</strong></td>
<td>Civil liability for twice the amount paid</td>
</tr>
<tr>
<td></td>
<td>&quot;[A]llow[ing], audit[ing], or pay[ing] any warrant or other certificate of indebtedness for services performed to any person not qualified as provided in A.R.S. § 38-201.&quot; A.R.S. § 38-607.</td>
<td></td>
</tr>
<tr>
<td>33.</td>
<td><strong>Retention of subordinate's salary.</strong></td>
<td>Class 5 felony</td>
</tr>
<tr>
<td></td>
<td>Accepting, retaining, or diverting for one's own use or the use of another any part of the salary or fees allowed by law to be paid to one's deputy or other employees. A.R.S. § 38-609.</td>
<td></td>
</tr>
<tr>
<td>34.</td>
<td><strong>Violating personnel provisions.</strong></td>
<td>Class 2 misdemeanor, plus suspension and five-year ban from state employment</td>
</tr>
<tr>
<td></td>
<td>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. § 41-775.</td>
<td></td>
</tr>
<tr>
<td>35.</td>
<td><strong>Violating lobbying provisions.</strong></td>
<td>Class 1 Misdemeanor</td>
</tr>
<tr>
<td></td>
<td>Knowingly violating laws relating to lobbying, registration of public lobbyists, lobbying expenditure reports, and gifts to state officers and employees as provided for in A.R.S. § 41-1231 to -1239. A.R.S. § 41-1237(A). See Chapter 16 for a discussion of the lobbying provisions.</td>
<td></td>
</tr>
</tbody>
</table>
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 may be incarcerated in the state penitentiary, A.R.S. § 13-701(A). Conviction of a misdemeanor may result in a fine up to $2,500 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 any fine and the term of any 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 the laws and rules governing the operation of their agency to determine what conduct may be subject to civil or criminal liability.
CHAPTER 3
PERSONNEL

Table of Contents

Section 3.1 Scope of This Chapter
Section 3.2 State Merit System
  3.2.1 Uncovered Employees
  3.2.2 Covered Employees
  3.2.3 Probationary Employees
  3.2.4 Appointment Employment
Section 3.3 Discipline of Covered Employees
  3.3.1 Reprimand and Counseling
  3.3.2 Suspension
  3.3.3 Demotion
  3.3.4 Dismissal
  3.3.5 Rules for Law Enforcement and Probation Officer Employees
Section 3.4 Appeal from Disciplinary Action
  3.4.1 Employee’s Disclosure of Information (“Whistleblowing”)
Section 3.5 Employee Grievances
Section 3.6 Agency Actions Affecting Employees
  3.6.1 Promotions and Promotional Probation
  3.6.2 Transfer

Revised 2011
3.6.3 Reorganization and Reduction in Force

Section 3.7 Employee Options

3.7.1 Voluntary Resignation and Resignation in Lieu of Dismissal
3.7.2 Voluntary Grade Decrease
3.7.3 Reinstatement and Reemployment

Section 3.8 Leave

3.8.1 Holidays
3.8.2 Annual Leave
3.8.3 Sick Leave
3.8.4 Compensatory Leave and Overtime Pay
3.8.5 Industrial Leave
3.8.6 Leave for Serious Health Condition Under the Family and Medical Leave Act
3.8.7 Other Leave
3.8.8 Medical Leave Without Pay
3.8.9 Leave Without Pay

Section 3.9 Conditions of Employment

3.9.1 Standards of Conduct
3.9.2 Conflict of Interest
3.9.3 Restricted Political Activity
3.9.4 Employment of Relatives

Section 3.10 Inquiries About State Employees

Revised 2011
Section 3.11  Equal Employment Opportunity

3.11.1  General Considerations Regarding Discrimination Complaints

3.11.1.1  Procedure upon Receipt of a Notice of Charge of Discrimination

3.11.1.2  Confidentiality

3.11.1.3  Settlement Agreements

3.11.1.4  Unlawful Discrimination

3.11.1.5  Retaliation

3.11.1.6  Interviewing

3.11.1.7  Nondiscriminatory Work Environment

3.11.1.8  Affirmative Action

3.11.2  Race, Color, and National Origin Discrimination

3.11.3  Sex Discrimination

3.11.3.1  Sexual Harassment

3.11.4  Religious Discrimination

3.11.5  Disability and Handicap Discrimination

3.11.6  Age Discrimination

3.11.7  Discrimination Grievances

Section 3.12  Workers' Compensation

3.12.1  Workers’ Compensation Defined

3.12.2  Workers Covered by the Workers’ Compensation System

3.12.3  Employer Responsibility for Industrial Injuries of Employees

3.12.4  Risk Management’s Role

Revised 2011
3.12.5 The Attorney General’s Role

Form 3.1 Administrative Leave Pending Investigation
Form 3.2 Return from Administrative Leave
Form 3.3 Demotion for Cause—Covered Employee
Form 3.4 Dismissal—Permanent Status State Employee
Form 3.5 Dismissal—Uncovered Employee
Form 3.6 Dismissal—Original Probationary Employee
Form 3.7 Dismissal—Temporary and Seasonal Employees
Form 3.8 End of Assignment—Limited, Temporary, or Seasonal Employees
Form 3.9 Medical Certification Requirement
Form 3.10 Medical—Order for Medical Examination
Form 3.11 Fitness-for-Duty Evaluation
Form 3.12 Memorandum of Concern—Option No. 1
Form 3.13 Memorandum of Concern—Option No. 2
Form 3.14 Notice of Charges Letter
Form 3.15 Notice of Charge(s) of Misconduct—Option No. 2
Form 3.16 Resignation
Form 3.17 Resignation—Acceptance of Verbal Resignation (Covered Employee)
Form 3.18A Resignation—In Lieu of Dismissal
Form 3.18B Resignation—In Lieu of Dismissal—Confirmation of Discussion
Form 3.19 Reversion—Failure to Complete Promotional Probation
| Form 3.20 | Separation Without Prejudice Following Extended Leave—Failure to Return |
| Form 3.21 | Separation Without Prejudice Following Extended Leave—Inability to Return |
| Form 3.22 | Separation Without Prejudice Following Extended Leave—Position Not Available |
| Form 3.23 | Suspension Without Pay—Covered Employee—Forty Hours or Less |
| Form 3.24 | Suspension Without Pay—Forty-one or More Hours |
| Form 3.25 | Voluntary Grade Decrease—Employee Request |
| Form 3.26 | Voluntary Grade Decrease—Management Acceptance |
| Form 3.27 | Reprimand |
| Form 3.28 | Request for Information |
CHAPTER 3
PERSONNEL

3.1 Scope of This Chapter. This Chapter reviews state and federal laws concerning personnel matters. As noted in this Chapter, for certain employment issues, it is particularly important that state agencies and other state employers consult with their assigned counsel or the Employment Law Section of the Attorney General’s Office. Chapter 15 discusses discrimination law, particularly as it concerns state employers.

3.2 State Merit System. Employees who are in the State Merit System are called “state service employees” or “covered employees.” The Department of Administration Personnel Rules, A.A.C. R2-5-101 through -904, apply to these employees. Certain other state employees are governed by other statutes and provisions. For example, the Law Enforcement Officers’ Merit System is governed by A.R.S. §§ 41-1830.11 through -1830.15 and A.A.C. R13-5-101 through -804. This Chapter discusses the Department of Administration personnel system as it pertains to both covered and uncovered employees.

3.2.1 Uncovered Employees. Employees who are not in the State Merit System are called “uncovered employees.” The Department of Administration Personnel Rules do not apply to uncovered employees. These rules, however, may be used for advisory purposes in personnel matters involving uncovered employees.

Uncovered employees may be disciplined or terminated at any time without a statement of cause and for any reason not prohibited by law. A.G. Opinion I01-011. Accordingly, uncovered employees do not have a protected interest in continued employment or a right to appeal disciplinary actions taken against them. An agency may dismiss an uncovered employee simply by notifying the employee that his or her employment is terminated. See Form 3.5.

Because an uncovered employee has no right to know the reasons for his or her dismissal, an agency should not disclose the reasons for the dismissal to the employee, either orally or in writing. Communicating a reason for the dismissal may result in liability for the agency or may entitle the uncovered employee to a hearing. Bishop v. Wood, 426 U.S. 341, 346 (1976); Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972); see also Montoya v. Law Enforcement Merit Sys. Council, 148 Ariz. 108, 110-11, 713 P.2d 309, 311-12 (App. 1985).

A permanent status state service employee may be granted a “mobility assignment” to an uncovered position or to another state agency for up to thirty-six months. A.A.C. R2-
5-208(D). The employee has the right to return to a position in the original agency in the same pay grade that he or she held before the mobility assignment if the employee possesses the knowledge, skills, and abilities that the position requires. *Id.* An employee who has been granted a mobility assignment may not be deprived of his or her status as a permanent employee without a hearing, even though he or she may be removed from the uncovered position without a hearing or a statement of cause. *Lara v. Cowan*, 848 F. Supp. 1456, 1458-59 (D. Ariz. 1994).

3.2.2 Covered Employees. Covered employees may be demoted, suspended, or dismissed only for cause pursuant to A.R.S. § 41-770 and A.A.C. R2-5-501, -802, and -803. See Sections 3.3 through 3.3.4 for further discussion regarding specific discipline that may be imposed on a covered employee.

3.2.3 Original Probationary Employees. An original probationary period of six months provides an agency with an opportunity to assess an employee’s suitability for permanent employment. A.A.C. R2-5-213. State service employees may be terminated at any time during the original probationary period without a statement of cause. Once a state service employee obtains permanent status, however, he or she may be disciplined only for cause. A permanent status employee may be terminated for misconduct or deficient job performance. A.R.S. § 41-770.

An agency may dismiss an employee during the original probationary period, and the probationary employee has no right to appeal that action. A.A.C. R2-5-213(C)(3)(b)(ii), -803(C)(1). As with an uncovered employee, an agency should not disclose to a probationary employee the reasons for his or her dismissal. See Form 3.6.

An agency head may extend the original probationary period for up to six months for employment-related reasons. A.A.C. R2-5-213(C)(2)(a). If the agency head takes no action to extend the probationary period or to terminate the probationary employee during the original probationary period, the employee will be awarded permanent status when he or she completes the probationary period. A.A.C. R2-5-213(C)(3)(a).

For a discussion on promotional probation, see Section 3.6.1.

3.2.4 Appointment Employment. An agency may meet its specific needs by hiring employees other than permanent, full-time personnel. Other types of employment include limited, temporary, provisional, emergency, clerical pool, and student appointments. Employees in these positions probably will not have a protected interest in continued employment or a right to appeal disciplinary actions taken against them. Unless an employee has the right to appeal a dismissal, an agency should not disclose to the employee the reasons for his or her dismissal. See Forms 3.7; 3.8. Consult A.A.C. R2-5-
3.3 **Discipline of Covered Employees.** The following discussions cover the most common forms of discipline that apply to covered employees. Discipline may be imposed as a corrective or a punitive measure in response to an employee’s misconduct or deficient job performance. See A.R.S. § 41-770. In disciplining employees, the most difficult task is not determining whether to impose discipline, but rather identifying the appropriate type of discipline. While progressive discipline is not legally mandated, progressive sanctions—from warnings to more severe penalties—are usually recommended. Agencies should contact their human resources representative for assistance when contemplating disciplinary action.

3.3.1 **Reprimand and Counseling.** Reprimand and counseling are the least severe forms of discipline. They provide ways to alert an employee to problems in his or her job performance and to urge corrective action before the problems become more serious. Reprimands may be oral or written. Oral reprimands allow a supervisor to express dissatisfaction with an employee’s job performance without leaving a permanent record. A written reprimand documents the supervisor’s dissatisfaction with the employee’s job performance, and it must be placed in the employee’s personnel file. See A.A.C. R2-5-105(B)(5)(a); Form 3.27. Although an oral or a written reprimand is not a prerequisite to imposing more severe disciplinary action, it may avert the need for more severe disciplinary action. A supervisor may also urge corrective action by counseling the employee and following up with a memorandum of concern. See Forms 3.12; 3.13. Although an employee may not appeal a reprimand or a memorandum of concern to the Arizona State Personnel Board, he or she may submit a grievance in accordance with the procedures in A.A.C. R2-5-701 and -702.

3.3.2 **Suspension.** When a reprimand is not adequate and dismissal is not warranted, an agency head may discipline an employee for misconduct or deficient job performance by relieving the employee of his or her duties without pay for up to thirty work days during any twelve-month period. A.A.C. R2-5-801(A)-(C). If the misconduct involves improper political activity under A.R.S. § 41-772, however, the agency head must either suspend the employee for not less than thirty work days or dismiss the employee. A.R.S. § 41-772(H).

If an employee is suspended without pay for more than forty hours, the employee has the right to appeal the suspension to the Personnel Board. See A.R.S. § 41-782. The suspension letter should reflect that right. See Forms 3.23 and 3.24 for examples of suspension letters. If the suspension is for forty hours or less, the employee may submit a grievance. See A.A.C. R2-5-701(B)(2). In issuing suspensions in increments other than full work weeks (such as an eight-hour suspension) to employees who are salaried and...
exempt under the Fair Labor Standards Act, 29 U.S.C. §§ 201 to 219, care must be taken to ensure that the suspension complies with the FLSA. In this situation, it is advisable to contact your employment attorney.

3.3.3 Demotion. An agency head may demote (move to a position in another class with a lower pay grade) a permanent status employee for cause. A.A.C. R2-5-802, -101(19); see also Form 3.3. A permanent status employee may appeal a demotion to the Personnel Board. A.A.C. R2-5-802(B). An employee must be given notice of a demotion prior to the demotion’s effective date. A.A.C. R2-5-802(B). (For the effect of demotion on pay, see A.A.C. R2-5-303(C).) If the employee requests or accepts demotion, the demotion is voluntary and the employee is not entitled to submit a grievance or to appeal the action. A.A.C. R2-5-208(E); see also Section 3.7.2. Reductions in pay grades based upon legitimate reorganizations, reductions in force, or reclassifications are not demotions. A.A.C. R2-5-303, -902, -903.

3.3.4 Dismissal. Permanent status employees may be dismissed from state service only for cause pursuant to A.R.S. § 41-770 and A.A.C. R2-5-501. A permanent status employee must be given notice of a contemplated dismissal in writing. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); Carlson v. Ariz. Personnel Bd., 214 Ariz. 426, 430, 153 P.3d 1055, 1059 (App. 2007); A.A.C. R2-5-803(A). This notice is called a “notice of charges.” The notice of charges letter must provide facts and legal grounds supporting the charges, identify the reasons why dismissal is contemplated, and notify the employee that he or she has the opportunity to present a written response to the charges no later than three working days after receiving the notice of charges. See Forms 3.14; 3.15. The agency head may extend this three-day time period in writing. A.A.C. R2-5-803(A).

The notice of charges should include the following information:

1. A description of the misconduct or deficient performance;
2. The dates that the misconduct or deficient performance occurred;
3. Names of key witnesses, if any;
4. Citations to the statutory subsections, personnel rules, or agency policies violated;
5. A description of the harm or damage resulting from the misconduct or deficient performance; and
6. A statement concerning prior warnings or discipline.
After considering the employee’s response, the agency head may decide to take less severe disciplinary action or no disciplinary action. If the agency head decides to take less severe disciplinary action, the agency should provide the employee with a letter that includes the information in the notice of charges (items 1 through 6 above),⁠¹ a statement of the discipline ultimately imposed, and the following:

1. A statement describing the corrective action that the employee must take to remedy the misconduct or deficient performance to avoid further discipline;

2. A statement of the consequences of failing to remedy the misconduct or deficient performance; and

3. A warning that any further misconduct or deficient performance may or will lead to additional discipline up to and including dismissal.

If the agency head decides that dismissal is appropriate, the agency must provide the employee with written notice of the decision. The letter should include the information in the notice of charges (items 1 through 6 above). See Form 3.4. Dismissal is effective only after the dismissal letter has been served on the employee in accordance with A.A.C. R2-5-803(B). However, if the employee is on an approved period of leave with pay, dismissal will not be effective until the end of the approved period of leave. A.A.C. R2-5-803(B).

### 3.3.5 Rules for Law Enforcement and Probation Officer Employees.

Arizona Revised Statutes § 38-1101 imposes certain requirements on state agencies that are investigating misconduct by nonprobationary employees who are statutorily defined as “law enforcement officers” or “probation officers.” These requirements apply regardless of whether the nonprobationary employee is a covered or an uncovered employee. The statute defines a law enforcement officer as an individual who is either (1) certified by the Arizona Peace Officer Standards and Training Board or (2) a detention or a correction officer. A.R.S. § 38-1101(P)(4). It defines a probation officer as someone who works as either a probation officer or a surveillance officer. A.R.S. § 38-1101(P)(5).

If an employee meets the statutory definition of law enforcement officer or probation officer, the agency must provide the employee with written notice before interviewing the

---

¹ If the employee’s response or additional investigation reveals that certain charges or facts are inaccurate, the disciplinary letter should correct those inaccuracies.
employee on a matter that the agency reasonably believes could lead to dismissal, demotion, or suspension. A.R.S. § 38-1101(A)(2). The notice must inform the employee of (1) any known allegations of misconduct, (2) the alleged facts on which the agency is basing the investigation, (3) the nature of the investigation, (4) whether the employee is the subject of the investigation, and (5) the employee’s right to have a representative present at the interview. Id.

The employee then has the right to request that a representative be present at the interview to act as an observer. A.R.S. § 38-1101(A)(1). The representative must be an employee of the same agency, or, if one is not reasonably available, a representative from the employee’s professional membership organization. Id. The agency should give the employee reasonable notice prior to the interview to ensure that the employee’s representative is available. Id. The representative cannot be an attorney unless the agency agrees that he or she can be and cannot verbally participate in the interview, but can be present only as an observer. Id. During the interview, the employee has the right to take short, reasonable breaks to consult in person or telephonically with an attorney or other representative. Id.

The Legislature has also enacted A.R.S. § 38-1104, which applies to law enforcement officers, but not to probation officers. It states that law enforcement officers “shall not be subject to disciplinary action except for just cause.” A.R.S. § 38-1104(A). It requires an agency to establish that the law enforcement officer had reasonable knowledge that the actions at issue constituted misconduct for which discipline could be imposed, A.R.S. § 38-1104(I)(3)(a), and that a preponderance of evidence supports the discipline, A.R.S. § 38-1104(I)(3)(c). Furthermore, the discipline must not be excessive and must be reasonably related to the seriousness of the offense and the officer’s service record. A.R.S. § 38-1104(I)(3)(d). However, an agency does not have to establish just cause to discipline law enforcement officers who are probationary employees, A.R.S. § 38-1104(B), or who are uncovered employees, A.R.S. § 38-1104(I)(4)(a).

3.4 Appeal from Disciplinary Action. Covered employees may appeal a suspension without pay for more than forty working hours, a demotion, or a dismissal. A.R.S. § 41-785(A). The appeal must be filed with the Personnel Board no later than ten working days after the action’s effective date. Id. An agency should be prepared to obtain the information and witnesses necessary to establish the basis for the disciplinary action. See Form 3.28. If an appeal is filed, the agency should immediately notify its employment counsel.

3.4.1 Appeals Involving Law Enforcement and Probation Officers. Arizona Revised Statutes § 38-1101 imposes additional requirements in disciplinary appeals involving state employees who qualify as law enforcement officers or probation officers. At any time after these employees file an appeal, they are entitled to request in writing a copy
of the complete investigative file related to their discipline. The agency must provide the investigative file to the employee within three business days of receiving the written request. A.R.S. § 38-1101(E)(1). These employees are also entitled, prior to their appeal hearings, to an exchange of copies of the exhibits that will be produced and of the names of the witnesses who will appear at the appeal hearing. A.R.S. § 38-1101(E)(2), (3). The statute also imposes additional requirements in the appeal process that are not required for state employees who are not law enforcement or probation officers.

3.4.2 Employee's Disclosure of Information (“Whistleblowing”). Whistleblower law constantly changes due to legislative rewriting and judicial interpretation. Agencies should therefore consult with counsel before taking disciplinary action against any employee who the agency believes may claim to be a whistleblower.

An employee may not take disciplinary action against another employee for disclosing to a “public body” information involving a matter of public concern that the disclosing employee reasonably believes evidences either a violation of the law or mismanagement, a gross waste of monies, or an abuse of authority. A.R.S. § 38-532(A). The term “public body” includes “the attorney general, the legislature, the governor, a federal, state or local law enforcement agency, the county attorney, the governing board of a community college district or school district, the board of supervisors of a county or an agency director.” A.R.S. § 38-531(5).

Arizona Revised Statutes § 38-532(B) requires an employee’s disclosure to a public body alleging a violation of law, mismanagement, gross waste of monies, or abuse of authority to be in writing and to contain the following information:

1. The date of the disclosure.
2. The name of the employee making the disclosure.
3. The nature of the alleged mismanagement, violation of law, gross waste of monies, or abuse of authority.
4. If possible, the date or range of dates on which the alleged violation of law, mismanagement, gross waste of monies or abuse of authority occurred.

An employer must provide an employee with a copy of A.R.S. § 38-532 (prohibited personnel practice relating to disclosure of information by public employees) upon request or any time that an employee alleges that disciplinary action has been taken against him or her for disclosing information. A.R.S. § 38-532(G). Any employee who believes that disciplinary action has been taken against him or her for disclosing information may file a
complaint with the Personnel Board. A.R.S. § 38-532(H). The complaint must be filed within ten days of the disciplinary action’s effective date. *Id.*

The Personnel Board must determine the validity of the complaint and whether the disciplinary action was taken as a result of the employee’s disclosure. *Id.* An employee does not commit a prohibited personnel practice if he or she takes disciplinary action against an employee for disclosing information in a manner prohibited by law or for disclosing information prescribed as confidential by law. A.R.S. § 38-532(E). The complaining employee, the employee alleged to have committed the prohibited personnel practice, and the employer may be represented by counsel during the hearing. A.R.S. § 38-532(J).

If the Personnel Board determines that the employee’s complaint is valid and that the disciplinary action was taken as a result of the disclosure, it must rescind the disciplinary action and order that all lost pay and benefits be returned to the employee. A.R.S. § 38-532(I). The employee may also recover attorney’s fees, costs, and general and special damages. A.R.S. § 38-532(D). The Personnel Board must also order the employee who committed the prohibited personnel practice to pay a civil penalty of up to five thousand dollars, and the employer must take appropriate disciplinary action against the employee who committed the prohibited personnel practice. A.R.S. § 38-532(C). The complaining employee, the employee alleged to have committed the prohibited personnel practice, and the employer may appeal the Personnel Board’s decision to the superior court. A.R.S. § 38-532(I).

The Arizona Court of Appeals has ruled that the administrative procedure described above is not mandatory and that an employee may file a complaint in superior court without first seeking a hearing before the Personnel Board. *Walters v. Maricopa County*, 195 Ariz. 476, 481, 990 P.2d 677, 682 (App. 1999). The court of appeals has also ruled that a nonclassified employee may bring a whistleblower complaint pursuant to A.R.S. § 23-1501. Under that statute, an employee may file a complaint against an employer for dismissing him or her in retaliation for making an oral or written disclosure to

either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information . . . and to take action to prevent further violations of the [law] or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.

But in *Mullenaux v. Graham County*, 207 Ariz. 1, 82 P.3d 362 (App. 2004), the court of appeals stated that a classified employee’s failure to exhaust the administrative remedies that the county’s grievance procedures provided made his action for wrongful discharge and breach of contract premature. The court rejected the employee’s argument that the county’s exhaustion statute was permissive rather than mandatory. *Id.* at 4-5, 82 P.3d at 365-66. It also rejected the employee’s claim that A.R.S. § 23-1501 or A.R.S. § 38-532 provided an independent statutory ground for his wrongful discharge claim. *Id.* at 6-7, 82 P.3d at 367-68. It acknowledged that A.R.S. §§ 23-1501 (which provides public or private employees with a cause of action for termination against their employers under certain circumstances) and 38-532 (which provides public employees with a cause of action for termination against their employers under certain circumstances) appeared to be inconsistent with the county’s exhaustion statute because they provided for direct causes of action in superior court. *Id.* at 6, 82 P.3d at 367. It harmonized all of the statutes by holding that employees must exhaust their administrative remedies under the county’s exhaustion statute but that they can then file an action in superior court under A.R.S. § 23-1501 or A.R.S. § 38-532 and assert any claims that the administrative process did not completely resolve or preclude. *Id.* at 7, 82 P.3d at 368.

3.5 Employee Grievances. Each agency is required to adopt a grievance procedure that affords every employee a means of resolving complaints concerning discrimination, noncompliance with the state personnel rules, or other work-related matters that directly and personally affect the employee (e.g., performance evaluations). A.A.C. R2-5-701(A). The grievance procedures established in each state agency must, at a minimum, include the requirements, provisions, and statements set forth in A.A.C. R2-5-702(A).

An employee may not submit a grievance regarding any matter for which another method of review is provided. A.A.C. R2-5-701(B). For example, an employee may not submit a grievance regarding retirement; life or health insurance; suspension for more than forty working hours, demotion, or dismissal resulting from disciplinary action; any examination, certification, or appointment; any classification action; or any reduction in force action. *Id.* An employee also may not submit a grievance concerning any matter that is not under the agency’s control (except for complaints alleging a violation of the personnel rules), A.A.C. R2-5-701(E), or challenging an agency’s management rights; specifically, an agency’s rights to direct its employees; to hire, promote, transfer, assign, and retain employees; or to maintain efficiency and determine the methods, means, and personnel by which agency operations are to be conducted, A.A.C. R2-5-701(C). An employee may, however, submit a grievance concerning the manner in which an agency administers the aforementioned management rights insofar as it personally affects the employee. *Id.*
An employee may not submit a grievance based on receiving a performance decrease, failing to receive a performance increase or special performance award, the amount of any increase or decrease, or the use of any job-related supplemental rating factors to determine the receipt or amount of an increase, decrease, or special performance award. A.A.C. R2-5-701(D). An employee may, however, submit a grievance concerning an overall performance evaluation or a specific rating.

A grievance cannot be amended once it has been referred to any step beyond the employee’s immediate supervisor. A.A.C. R2-5-701(F). If additional documentation is submitted after the grievance is initiated, the reviewing official may remand the grievance to the appropriate previous level for reconsideration. Id. An employee who is not satisfied with the agency head’s decision on a grievance alleging discrimination or noncompliance with personnel rules may submit the grievance to the Director of the Department of Administration for review within five working days after receiving the agency head’s response. A.A.C. R2-5-702(B)(1). If the facts of the grievance do not support the agency head’s response, the Director will conduct an investigation and reach a final decision. Id. A Department of Administration employee who is not satisfied with the Director’s decision on a grievance alleging discrimination or noncompliance with the personnel rules may resubmit the grievance to the Director within five working days after receiving the Director’s decision. A.A.C. R2-5-702(B)(2). The Director will then appoint an outside investigator to review the grievance. Id. If the facts of the grievance do not support the Director’s response, the investigator will conduct an investigation and reach a final decision. Id. An employee may file a charge of discrimination with the Arizona Civil Rights Division of the Attorney General’s Office or the Equal Employment Opportunity Commission at any time.

3.6 Agency Actions Affecting Employees.

3.6.1 Promotions and Promotional Probation. State service promotions must be competitive. A.A.C. R2-5-208(A)(1). The evaluation of candidates for placement on an internal promotion referral list must be based on the knowledge, skills, and abilities required for the position. A.A.C. R2-5-208(A)(3). An employee who is promoted must serve a promotional probationary period of six months. A.A.C. R2-5-213(D)(1). If an employee fails to successfully complete the promotional probationary period, the agency head may either revert the employee to a position in the current employing agency in the class in which the employee held permanent status immediately before promotion or offer the employee a similar position in another class at the same grade as the class in which the employee holds permanent status, provided that the employee meets the knowledge, skill, and ability requirements of that position. A.A.C. R2-5-213(D)(3). If a vacancy does not exist in the agency, the rules governing reduction in force apply. A.A.C. R2-5-213(D)(6); see also Section 3.6.3.
Reversion to a former position or transfer to another position for failure to complete the promotional probationary period is not an appealable disciplinary action. A.A.C. R2-5-213(D)(5); see also Form 3.19. However, neither reversion to a former class nor transfer to another position precludes the imposition of disciplinary action. A.A.C. R2-5-213(D)(4). An employee who is “repromoted” is not required to serve a probationary period. A.A.C. R2-5-213(D)(7).

3.6.2 Transfer. An agency head may transfer an employee to another position in the same pay grade within the agency. A.A.C. R2-5-208(B)(1). An employee may also transfer to a position in the same pay grade in another agency with the approval of that agency’s head. A.A.C. R2-5-208(B)(2). However, the employee must meet the qualifications required for the position as identified in the class specification or the position description questionnaire for the position to which he or she is transferred. A.A.C. R2-5-208(B)(3). In addition, 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 made in good faith. See Lewis v. Jamieson, 135 Ariz. 322, 325, 660 P.2d 1249, 1252 (App. 1983).

If all or a part of the functions of a state service agency or a non-state service agency are transferred to another state service agency, all of the affected employees will be transferred to or offered state service employment in the agency to which the functions have been transferred. A.A.C. R2-5-208(B)(4)(a). However, any non-state service employee who is offered state service employment may be required to serve a probationary period. A.A.C. R2-5-208(B)(4)(b).

3.6.3 Reorganization and Reduction in Force. An agency may reduce its work force when a lack of funds or work, the abolition of a position, or a material change in duties or organization requires. See A.A.C. R2-5-902. The agency head must submit an agency proposal for a reduction in force to the Director of the Department of Administration at least thirty days prior to the effective date of the proposed reduction in force. A.A.C. R2-5-902(A)(2). An agency may also conduct a temporary reduction in force when funding necessary to pay employees is suspended or reduced. A.A.C. R2-5-903(A).

In administering a reduction of force, an agency must first separate provisional, clerical pool, temporary, seasonal, probationary, and limited employees before taking any reduction in force action affecting permanent status employees. A.A.C. R2-5-902(B)(1). The agency must then determine the order in which to transfer or separate permanent status employees as part of a reduction in force by assigning retention points to employees based on performance and length of state service. See A.A.C. R2-5-902(B)-(E). Employees on promotional probation or detail to special duty shall compete for retention only in the class in which they hold permanent status. A.A.C. R2-5-902(B)(4).
part-time employees can compete for retention only against other permanent part-time employees who are in the same class series. A.A.C. R2-5-902(B)(6).

The agency must give written notice at least five working days in advance to each employee to be transferred or separated as part of a reduction in force unless circumstances beyond its control prevent it from doing so. A.A.C. R2-5-902(F). Within three working days of receiving the notice, unless a longer period of time is authorized, an employee may request a review of the procedure that resulted in the employee’s transfer, reduction, or separation due to a reduction in force. A.A.C. R2-5-902(G)(2). The request for review must be based on error and must contain specific information supporting the alleged error and a proposed resolution. *Id.* The agency head must review the request and respond to the employee within five working days of receiving the request. *Id.*

A reclassification to a lower grade as part of an improper reorganization constitutes a demotion that may be appealed to the State Personnel Board. *Rolfe v. State ex rel. Huerta*, 131 Ariz. 592, 594, 643 P.2d 505, 508 (App. 1982).

3.6.4 Separations Without Prejudice. In some cases, an agency may issue a separation without prejudice pursuant to A.A.C. R2-5-101(59). A “separation without prejudice” is the nondisciplinary removal of an employee in good standing from state service. *Id.* An agency may separate an employee without prejudice when an employee does not return to work after approved leave without pay. A.A.C. R2-5-414(D)(3).

3.7 Employee Options.

3.7.1 Voluntary Resignation and Resignation in Lieu of Dismissal. An employee may resign from state service by submitting a written resignation to the agency head at least ten working days prior to the resignation’s effective date. A.A.C. R2-5-901(A); see also Form 3.16. An employee who fails to give such notice will not be eligible for reinstatement unless the Director of the Department of Administration determines that the employee had good cause for not giving such notice. *Id.* If the agency intends to accept the resignation, the agency head should immediately do so in writing. See Forms 3.17, 3.18B.

If an employee resigns orally, and the agency intends to accept the resignation, the agency head should immediately confirm the resignation in writing. A.A.C. R2-5-901(B). An agency head may refuse to accept a written or an oral resignation and may instead dismiss the employee pursuant to A.A.C. R2-5-803. See A.A.C. R2-5-901(C). An employee may withdraw a resignation by personally delivering a written withdrawal to the agency head no later than the end of the next working day after submitting the oral or written notice of resignation. A.A.C. R2-5-901(D). If a timely withdrawal is not submitted,
the resignation will be final unless both the agency head and the employee agree that the resignation may be withdrawn. *Id.*

When an employee is compelled to choose between immediate resignation and dismissal, a resulting resignation may be found to have been involuntary if the employee was not informed that he or she had the right to appeal a dismissal to the Board and that resignation waives this right. *Ariz. Dep’t of Econ. Sec. v. Redlon,* 215 Ariz. 13, 20, 156 P.3d 430, 437 (App. 2007). In such a case, the Personnel Board properly accepts jurisdiction to hear such claims. *Id.*

Therefore, if an employee attempts to resign (1) while facing any pending disciplinary action that the Personnel Board could hear or (2) while he or she is a party to a lawsuit connected with a disciplinary action, the agency should consult with legal counsel before acting on the request to resign.

3.7.2 Voluntary Grade Decrease. Employees may request a voluntary grade decrease. A.A.C. R2-5-208(E)(1); see also A.A.C. R2-5-303(O); Form 3.25. The employee requesting the voluntary grade decrease must, however, be qualified for the position requested. A.A.C. R2-5-208(E). The agency should approve the request in writing. See Form 3.26. An employee cannot grieve or appeal an approved voluntary pay grade decrease. A.A.C. R2-5-208(E). An employee who is on original probation when the voluntary grade decrease request is approved must serve a new original probation in the new position. *Id.*

3.7.3 Reinstatement and Reemployment. For two years from the effective date of the separation, an agency may consider a former permanent status employee who has resigned and given proper notice, see A.A.C. R2-5-901(A), or who has been separated without prejudice, see A.A.C. R2-5-101(54), for reinstatement for the class in which the employee held permanent status at the time of separation and for all classes at the same or at a lower grade for which the employee is qualified. A.A.C. R2-5-205(B)(5). An agency may also consider for two years from the effective date of the separation a former permanent status employee who has been separated as a result of a reduction in force for reemployment for the class in which the employee held permanent status at the time of separation and for all classes at the same or at a lower grade for which the employee is qualified. A.A.C. R2-5-205(B)(4).

An agency head may require a former employee who is reinstated or reemployed to complete an original probationary period. A.A.C. R2-5-213(E). In these cases, the agency head should confirm in writing that the employee must complete the original probationary period. However, an agency head must require a former employee to complete an original probationary period if the former employee is reinstated or reemployed in a class other than the class in which the employee previously held permanent status. *Id.* Tests are not
required for reinstatement or reemployment unless the requirements of the class have changed or are different from the requirements of the class from which the applicant separated. A.A.C. R2-5-203(D)(4).

3.8 Leave.

3.8.1 Holidays. State service holidays are listed in A.A.C. R2-5-402(A). An employee who is regularly scheduled to work on a day on which a state holiday falls is entitled to be absent with pay for the number of hours regularly scheduled to work unless required to work to maintain essential state services. A.A.C. R2-5-402(B). An employee who is not scheduled to work on a day on which a state holiday falls will receive holiday compensation for the number of hours normally worked per day, unless the employee is on leave without pay on the employee’s work days immediately preceding or following the state holiday. A.A.C. R2-5-402(C). An employee who is required to work on a state holiday will receive both holiday compensation and one hour of pay at the current salary rate for each hour worked. A.A.C. R2-5-402(D).

3.8.2 Annual Leave. Annual leave is a broad category of leave that includes all periods of approved absence from work with pay that are not chargeable to another category of leave. A.A.C. R2-5-403(A). An employee may take annual leave at any time that the agency head approves. A.A.C. R2-5-403(F). An agency should reasonably permit an employee to use accrued annual leave during the course of the calendar year. If an agency disapproves an employee’s taking annual leave on the ground that the agency’s ability to function would be adversely affected by the leave (e.g., when it would leave an insufficient number of employees to provide service), the agency should arrange with the employee an alternative time for use of the leave.

3.8.3 Sick Leave. Sick leave includes any approved period of absence from work with pay due to any of the following:

1. Illness or injury which renders the employee unable to perform the duties of the position. Minor, nondisabling injuries and illnesses 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, dependent child, or parent. Sick leave granted for this purpose shall not exceed forty hours per calendar year.

A.A.C. R2-5-404(A).

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 evidence substantiating the need for sick leave. A.A.C. R2-5-404(D)(2); see also Form 3.9. If the agency determines that the evidence is inadequate, the absence must be charged to another category of leave or be considered an absence without leave. A.A.C. R2-5-404(D)(2). Abuse of sick leave is a basis for disciplinary action.

Under some circumstances, an agency head may require an employee to submit to a medical examination by a licensed health care practitioner whom the agency designates. A.A.C. R2-5-404(D)(3); see also Forms 3.10, 3.11. This is commonly known as a fitness-for-duty examination. The agency pays for the examination, and the employee is not charged leave for time spent traveling to or from or participating in the examination. A.A.C. R2-5-404(D)(3)(c). If the practitioner determines that the employee should not work, the agency head may place the employee on sick leave or, if the employee's sick leave is exhausted, on leave without pay. Id. The agency may require the practitioner’s approval before the employee is permitted to return to work. Id. Requiring an employee to submit to a medical examination should be considered very carefully. Determining what, if any, action should be taken following the practitioner’s assessment likewise requires serious consideration. If at all possible, the situation should be discussed with the agency’s human resources representative or with employment counsel.

3.8.4 Compensatory Leave and Overtime Pay. The agency head must approve all overtime work in advance. A.A.C. R2-5-305(A). The Director of the Department of Administration determines which positions are entitled to compensatory leave or overtime pay in accordance with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219. A.A.C. R2-5-305(B). An employee whom the FLSA covers must be compensated for overtime work by either additional pay at the rate of one and one-half times the employee’s regular rate for each excess hour worked or compensatory leave at the rate of one and one-half hours for each excess hour worked. A.A.C. R2-5-305(C)(1). An employee may be compensated with compensatory leave only if he or she has agreed to that arrangement in advance. A.A.C. R2-5-305(C)(2). Most agencies require employees to sign a form at the time that they are hired, indicating whether they will accept compensatory leave in lieu of overtime pay. Employees may change their decision. If an employee agrees to accept either overtime pay or compensatory leave, the agency head determines whether to compensate the employee for excess hours with overtime pay or compensatory leave,
unless the employee’s compensatory leave balance has reached the maximum allowed in A.A.C. R2-5-305(F), in which case the agency head must compensate the employee with overtime pay. A.A.C. R2-5-305(C)(2).

Covered employees who are not excluded under A.A.C. R2-5-305(E) and who are exempt from the FLSA must receive one hour of compensatory leave for each hour of overtime worked or, if the Director of the Department of Administration approves, overtime pay at the regular pay rate. A.A.C. R2-5-305(D).

Upon separation, any accumulated compensatory leave is paid as provided in A.A.C. R2-5-305(G).

3.8.5 Industrial Leave. An agency must place an employee who sustains a job-related disability that is compensable under the Workers’ Compensation Law, A.R.S. §§ 23-901 to -1091, on sick leave. A.A.C. R2-5-405(A). If the employee exhausts all sick leave and either fails to request or has exhausted all annual or compensatory leave, the agency must place the employee on leave without pay. Id. If the employee is on leave under the Workers’ Compensation laws and that leave qualifies for Family and Medical Leave Act (FMLA) leave, an agency must count the leave as FMLA leave. Id. An agency must apply industrial and FMLA leave concurrently. Id.

3.8.6 Leave under the Family and Medical Leave Act. Under the FMLA, an employee may take up to twelve weeks of leave for the following: the birth of a child and caring for the child within one year of birth; the placement of a child for adoption or foster care and caring for the newly placed child within one year of placement, see A.A.C. R2-5-411; caring for a family member with a “serious health condition,” see A.A.C. R2-5-412(B); or “a serious health condition” that makes the employee unable to perform the essential functions of the job, see A.A.C. R2-5-412(A). However, the employee must take FMLA leave in the order enumerated in A.A.C. R2-5-412.

Under the FMLA, an employee who is the spouse, son, daughter, parent, or next of kin of a covered service member may take up to twenty-six work weeks of leave during a single twelve-month period to care for a service member who has a serious injury or illness. An employee may take up to twelve weeks of FMLA leave if the employee’s spouse, child, or parent is a member of the military reserves or the National Guard who faces recall to active duty if a qualifying exigency exists.

An employee who takes FMLA leave is entitled to return to a position that is the same as or is equivalent to the position that he or she held before taking the leave. Guo v. Maricopa County Med. Ctr., 196 Ariz. 11, 18, 992 P.2d 11, 18 (App. 1999) (citing 29 U.S.C. § 2614(a)(1)). “If there is a conflict between the provisions of [the Personnel
Administration] rules and the FMLA, the provisions of the FMLA govern.” A.A.C. R2-5-412(H).

3.8.7 Other Leave. Other categories of leave with pay include Civic Duty Leave (A.A.C. R2-5-406), Military Leave (A.A.C. R2-5-407), Educational Leave (A.A.C. R2-5-408), Administrative Leave (A.A.C. R2-5-409), and Bereavement Leave (A.A.C. R2-5-410). Parental leave is “any combination of annual leave, sick leave, compensatory leave, or leave without pay taken by an employee due to pregnancy, childbirth, miscarriage, abortion, or adoption of children.” A.A.C. R2-5-411(a).

3.8.8 Medical Leave Without Pay. An agency must place an employee on medical leave without pay if the employee’s physician documents and an agency-selected physician confirms that the employee is unable to work due to a “seriously incapacitating and extended illness or injury” that is not job-related. A.A.C. R2-5-413(A). To qualify for medical leave without pay, however, the employee must have exhausted all leave balances, including leave donated to the employee. Id. The leave terminates when the employee returns to work or the employee is absent for 180 days, whichever occurs first. Id. If leave is donated to the employee while the employee is on medical leave without pay, the donated leave does not restart the 180 days. However, the donated time cannot be counted toward the 180 days. “An employee who returns to work after a period of leave without pay of 80 consecutive hours or less shall [be] return[ed] to the same position [previously held].” A.A.C. R2-5-414(D)(1). “[A]n employee who returns to work after a period of leave without pay in excess of 80 consecutive hours is entitled to return to a position in the [same] class [previously held]” if available and if the leave was terminated in accordance with A.A.C. R2-5-414(D)(2)(a), (b), or (c). If a position in the same class is not available, the employee may be separated without prejudice. A.A.C. R2-5-414(D)(4).

3.8.9 Leave Without Pay. Leave without pay must be requested in writing in advance and be approved by the agency head. A.A.C. R2-5-414 (A). Before leave without pay is approved, all annual and, if applicable, sick leave should be exhausted unless the situation involves “parental leave, FMLA leave, military leave, or leave granted to forestall a reduction in force.” A.A.C. R2-5-414(C). “An employee who returns to work after a period of leave without pay of 80 consecutive hours or less shall [be] return[ed] to the same position [previously held].” A.A.C. R2-5-414(D)(1). “[A]n employee who returns to work after a period of leave without pay in excess of 80 consecutive hours is entitled to return to a position in the [same] class [previously held]” if available and if the leave was terminated in accordance with A.A.C. R2-5-414(D)(2)(a), (b), or (c). If a position in the same class is not available, the employee may be separated without prejudice, A.A.C. R2-5-414(D)(4); see also Forms 3.21, 3.22 unless the employee is returning from leave without pay granted for military service, industrial illness or injury, to forestall a reduction in force as part of parental or FMLA leave, or to accept an uncovered position, in which case a reduction in force must take place, A.A.C. R2-5-414(D)(5). Although an agency head has discretion to
grant or deny a request for leave without pay, he or she should apply such discretion consistently.

If an employee fails to return to work on the first day after the approved period of leave, the agency may consider the employee’s failure to return a resignation, a separation without prejudice, or cause for dismissal, A.A.C. R2-5-414(D)(3); see also Form 3.20. The agency should contact its human resources representative or employment counsel with any questions, particularly if the employee is unable to return for medical or disability reasons. The agency must consider whether the FMLA or the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213, applies when deciding what action to take following an employee’s failure to return to work on the first day after the approved period of leave without pay.

3.9 Conditions of Employment.

3.9.1 Standards of Conduct. All employees are required to know and to comply with the standards of conduct set forth in A.A.C. R2-5-501. Violations of the standards of conduct constitute cause for discipline, including dismissal. A.A.C. R2-5-501(A). Employees are required, for example, to maintain high standards of honesty, integrity, and impartiality and to be courteous and prompt in dealing with and serving the public. A.A.C. R2-5-501(B). Employees must also comply with state laws and rules. Id.

The standards of conduct also contain a gratuity policy that prohibits state service employees from accepting or soliciting, directly or indirectly, anything of economic value as a gift, gratuity, favor, entertainment, or loan that is, or may appear to be, designed to influence the employee’s official conduct. This provision shall not prohibit acceptance by an employee of food, refreshments, or unsolicited advertising or promotional material of nominal value. A.A.C. R2-5-501(C)(4). An agency may decide to promulgate a more detailed gratuity policy to provide additional guidance to its employees. However, the agency’s policy must include or incorporate by reference all the provisions of A.A.C. R2-5-501(C)(4).

The standards of conduct also prohibit any employee from taking any disciplinary action against another employee that impedes or interferes with that employee’s exercise of any right granted under the law or the personnel administration rules. A.A.C. R2-5-501(D). Any employee found to have acted in reprisal toward another employee for that
employee’s exercise of his or her rights may be disciplined in accordance with A.A.C. R2-5-801 through -803. See A.A.C. R2-5-501(D).

3.9.2 Conflict of Interest. All employees are required to know the conflict-of-interest laws set forth in A.R.S. §§ 38-501 through -511. The conflict-of-interest laws apply to all public officers and employees (full- or part-time) of incorporated cities or towns, political subdivisions (including all school districts), the State, and any of the State’s departments, commissions, agencies, bodies, or boards. A.R.S. §§ 38-501, -502(2), (5). The purpose of the conflict-of-interest laws is to protect the public from self-dealing by public employees. Maucher v. City of Eloy, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985). For example, school district employees are required to engage in public competitive bidding in making purchases regardless of the cost involved or the source of funding. A.G. Opinion I06-002 at 1.

Any public officer or employee who has, or whose relative has, a substantial interest in any contract, sale, purchase, or service to a public agency or in any decision of a public agency, must make that interest known in the public agency’s official records and is prohibited from participating in any manner in any contract, sale, purchase, or decision. A.R.S. § 38-503(A), (B). The officer or employee must make the interest known by signing and filing a paper that fully discloses the substantial interest(s) or by filing a copy of the public agency’s official minutes that fully discloses the substantial interest(s). A.R.S. § 38-502(3). “‘Substantial interest’ means any pecuniary or proprietary interest, either direct or indirect, other than a remote interest.” A.R.S. § 38-502(11). The prohibition includes participating in any discussions, study groups, or decisions where an actual or potential conflict is present. A.G. Opinion I03-005 at 1. If a conflict is not disclosed, any affected contract is voidable. See A.R.S. § 38-506(A).

Employees are prohibited from representing another person before an agency that currently employs them or that employed them within the preceding twelve months on any matter in which employees personally participated by a substantial and material exercise of discretion. A.R.S. § 38-504(A). Employees are also prohibited from disclosing or using for personal profit any confidential information acquired in the course of official duties during their employment and for two years thereafter. A.R.S. § 38-504(B). Employees are also prohibited from using or attempting to use their positions for personal gain, A.R.S. § 38-504(C), and from receiving direct or indirect compensation other than as provided by law for any service rendered in any matter pending before the agency that employs the employee, A.R.S. § 38-505(A). Penalties for violating any of the conflict-of-interest laws include forfeiture of public employment and possible prosecution. A.R.S. § 38-510(A), (B).

See Chapter 8 for a more detailed review of conflict-of-interest law or contact legal counsel if there are additional questions.
3.9.3 Restricted Political Activity. Arizona Revised Statutes § 41-772 limits covered employees' participation in political activities. Subsection B of that statute provides that state employees or personnel board members may not

1. Be a “member of any national, state or local committee of a political party,”
2. Be “an officer or chairman of a committee of a partisan political club,”
3. Be “a candidate for nomination or election to any paid public office,”
4. “[H]old any paid, elective public office” (one for which compensation is provided regardless of whether the compensation is accepted),
5. “[T]ake any part in the management or affairs of any political party,” or
6. “[Take any part] in the management of any partisan or nonpartisan campaign or recall effort.”

Arizona Revised Statutes § 41-772 further provides that covered employees may not “[u]se any political endorsement in connection with any appointment to a position in the state service” or “[u]se or promise to use any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration.” A.R.S. § 41-772(A).

However, one does not become a “candidate” under A.R.S. § 41-772(B) until nomination papers are filed. A.R.S. § 16-311(H). Up to the point of filing, a covered employee may take other preliminary steps such as filing petitions or forming campaign committees without resigning his position. This section applies only to covered employees. A.G. Opinion I10-005 at 3.

None of the A.R.S. § 41-772 restrictions on political activity, however, are to “be construed as denying any employee or board member his civil or political liberties as guaranteed by the United States and Arizona Constitutions.” A.R.S. § 41-772(K). Thus, covered employees are permitted to wear buttons, to place bumper stickers on their personal vehicles, and to participate in initiative, referendum, and other ballot measure campaigns without restriction. See Ariz. Att'y Gen. Ops. I90-054 at 4-5, I87-028 at 2-3.

---

2 The provisions of A.R.S. § 41-772 do not apply “to school board elections or community college district governing board elections, and an employee may serve as a member of the governing board of a common or high school district or as a member of a community college district governing board.” A.R.S. § 41-772(G).
Covered employees are further permitted to do the following:

1. Express opinions.

2. Attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues.

3. Cast votes and sign nomination or recall petitions.

4. Make contributions to candidates, political parties, or campaign committees contributing to candidates or advocating the election or defeat of candidates.

5. Circulate candidate nomination petitions or recall petitions.

6. Engage in activities to advocate the election or defeat of any candidate.

7. Solicit or encourage contributions to be made directly to candidates or campaign committees contributing to candidates or advocating the election or defeat of candidates.

A.R.S. § 41-772(B). However, with the exception of expressing opinions or being absent from work for the purpose of voting pursuant to A.R.S. § 16-402, covered employees may not engage in permissible political activities “while on duty, while in uniform, or at public expense.” A.R.S. § 41-772(C).

Section 41-772 prohibits any person from soliciting employees to engage or not to engage in permitted activities “with the direct or indirect use of any threat, intimidation or coercion including threats of discrimination, reprisal, force or any other adverse consequence including the loss of any benefit, reward, promotion, advancement or compensation.” A.R.S. § 41-772(D). It also prohibits any person from subjecting employees who engage in or who choose not to engage in permitted activity “to any direct or indirect discrimination, reprisal, force, coercion, intimidation or any other adverse consequence.” A.R.S. § 41-772(E), (F).

A covered employee who engages in restricted political activity is subject to suspension of not less than thirty days or dismissal. A.R.S. § 41-772(H). An employee who violates A.R.S. § 41-772(D), (E), or (F) is guilty of a class 6 felony. A.R.S. § 41-772(I)(1). An employee who violates any other provision of A.R.S. § 41-772 is guilty of a class 1 misdemeanor. A.R.S. § 41-772(I)(2). In addition to any other penalty, any person
soliciting or encouraging a contribution in a manner that A.R.S. § 41-772 prohibits is subject to a civil penalty of up to three times the amount of the contribution plus costs, expenses, and reasonable attorney fees. A.R.S. § 41-772(J).

When interpreting A.R.S. § 41-772, one must construe its provisions in accordance with its underlying policy. It specifically provides as follows:

It is the public policy of this state, reflected in this section, that government programs be administered in an unbiased manner and without favoritism for or against any political party or group or any member in order to promote public confidence in government, governmental integrity and the efficient delivery of governmental services and to ensure that all employees are free from any express or implied requirement or any political or other pressure of any kind to engage or not engage in any activity permitted by this section.

A.R.S. § 41-772(L).

None of the personnel rules that the Department of Administration has promulgated, including those that incorporate the A.R.S. § 41-772 restrictions on political activity, apply to the following:

1. Elected state officers.

2. State officers and members of boards and commissions appointed by the legislature or the Governor, the employees of the Governor’s office, the employees of the Arizona legislative council, and the employees of the supreme court and the court of appeals.

3. State officers and employees appointed or employed by the legislature or either house thereof.

4. The curator, curatorial aides and tour guides and any other person employed to work in the state capitol museum.

5. Officers or employees of state universities and personnel of the Arizona state school for the deaf and the blind.

6. Patients or inmates employed in state institutions.

7. Officers and enlisted personnel of the national guard of Arizona.
8. The single administrative or executive director and one deputy director of each state department or agency.

9. Not more than two assistants who serve in the office of an elected state officer, where that elected state officer is the sole elected head of the department.

10. One administrative assistant who serves a board or commission elected to head a state agency, department or division, and one assistant for each elected member of such a board or commission.

11. Persons reporting directly to the Governor.

12. Employees of the department of emergency and military affairs who occupy Arizona national guard positions identified as mobilization assets.

13. Except as otherwise required by federal law and except for certified peace officers as defined in section 38-842, correctional officers and juvenile correctional officers, state officers and employees who are appointed or employed after December 31, 2006 and who are at a pay grade of twenty-four or above.

14. Any other position exempted by law.

A.R.S. § 41-771(A).

Except for the anticoercion restrictions of A.R.S. § 41-772(D), (E), and (F), none of the personnel rules, including those that incorporate the other A.R.S. § 41-772 restrictions on political activity, apply to positions that the Director of the Department of Administration determines meet any of the following criteria:

1. Top level positions in a department or agency that determine and publicly advocate substantive program policy. This includes those persons engaged in the direction of line operations if they report directly to the director or deputy director of the agency and in large multiprogram agencies, those persons who report directly to the head of a primary component of the department or agency.

2. Those persons who are required to maintain a direct confidential working relationship with an exempt official.
3. Persons who provide legal counsel.

4. Positions that are part time.

5. Positions that are temporary, established for the purpose of conducting a special project, study, or investigation.

6. Positions that are essentially for rehabilitation purposes.

7. Positions that are determined by the director to be directly or indirectly engaged in establishing policy or enforcement standards.

8. Directors of all institutions which maintain supervision or care on a twenty-four hour per day basis other than halfway houses or group homes.

A.R.S. § 41-771(B).

Finally, certain covered and uncovered positions funded with federal money are subject to more restrictive provisions governing political activity. See 5 U.S.C. § 7324. Supervisors and managers who administer programs subject to these restrictions should inform the affected employees. Id.

### 3.9.4 Employment of Relatives.

Employment of relatives is restricted in accordance with A.R.S. § 38-481 and A.A.C. R2-5-207. State, county, and city officials are prohibited from appointing or voting for the appointment of a relative to any clerkship, office, position, employment, or duty in any department of the state, district, county, city, or municipal government of which the officer is a member. A.R.S. § 38-481(A). An agency should direct questions about this subject to legal counsel.

### 3.10 Inquiries About State Employees.

Access to an employee’s personnel file is limited to the following persons:

1. The employee or another person with written authorization from the employee to review the personnel file.

2. Agency personnel designated by the agency head as having a need for such information.

3. Department officials in the normal line of duty.
4. Officials acting in response to court orders or subpoenas.

5. Officials of an agency to which the employee has applied.

6. An official of an agency of the federal government, state government or any of their political subdivisions, if the agency head of the employing agency deems access to the file to be appropriate to a proper function of the official requesting access.

A.A.C. R2-5-105(E).

For purposes of determining access to personnel files, an “official” is defined as “one who provides identification verifying that he is exercising powers and duties on behalf of the chief administrative head of a public body.” Id. The documents to be maintained in an employee’s personnel file are specified in A.A.C. R2-5-105. This includes records of disciplinary actions, which are deemed to be public records under A.R.S. § 39-128.

Although certain information about state employees is considered public information, when additional information is requested or when an agency is otherwise concerned about releasing information about an employee, the agency should contact legal counsel before releasing the information.

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 applicants for employment or employees with regard to hiring; discipline; discharge; compensation; or terms, conditions, or privileges of employment because of an individual’s race, color, religion, sex, national origin, age, disability, or handicap. See generally Chapter 15. The Attorney General’s Office is available to assist agencies with questions and problems that arise in the area of equal employment opportunity. Specifically, the Attorney General’s Office will provide training and will evaluate programs and practices to ensure that agencies are compliant. It will also defend agencies against charges of discriminatory action.

3.11.1 General Considerations Regarding Discrimination Complaints.

An employee may file a complaint with either the Civil Rights Section of the Attorney General’s Office, see Chapter 15, or the EEOC. The EEOC investigates complaints filed with the Civil Rights Section against state employers. When a complaint is filed with the EEOC, the EEOC will contact the state agency involved. The EEOC may inquire if the agency is interested in conciliation or it may request a statement of position and documentation in support of the agency’s position. A copy of any charge of discrimination should immediately be sent to the Chief Counsel of the Liability Management Section 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 employment counsel for any questions or assistance on discrimination matters not yet filed with investigative agencies.

3.11.1.2 Confidentiality. Discrimination complaints must be handled in a confidential manner. See A.R.S. § 41-1481(A), A.A.C. R10-3-103. For this reason, and to ensure against charges of retaliation, information that a discrimination charge has been filed and that an investigation has been undertaken should be discussed only with those who have a need to know. A.R.S. § 41-1481(A), A.A.C. R10-3-103; see also A.R.S. § 41-1464(A). Investigative and charge files should be kept in a secure area separate from the agency’s personnel files.

3.11.1.3 Settlement Agreements. Discrimination charges, whether formal or informal, may result in negotiated settlements. The roles of the Attorney General’s Office and state agencies in settling cases are set forth in A.R.S. §§ 41-192(B)(4) and -621(N). The roles vary depending on the cause of action asserted. Before any settlement agreement is reached, all entities must comply with the duties imposed by statute.

3.11.1.4 Unlawful Discrimination. Employment discrimination takes many forms, each with different legal bases, proof requirements, and ramifications. See Chapter 15 for a discussion of discrimination law and consult legal counsel for advice on discrimination charges.

3.11.1.5 Retaliation. It is unlawful to retaliate against any employee who files an external or internal discrimination charge or who assists or participates in the investigation of such a charge. 42 U.S.C. §§ 2000e-3(a), 2000ff-6(f), 12203(a); A.R.S. § 41-1464(A); see also Section 15.15.

3.11.1.6 Interviewing. Job applicants should never be asked a question not directly related to the qualifications for employment. See generally Chapter 15. For example, an applicant should never be asked about his or her race, color, national origin, religion, age, sex, politics, marital or family status, genetic information, or family medical history. Because employment decisions may not be made upon these bases, A.R.S. § 41-
1463, agencies should avoid raising the issues and should decline to discuss these issues if the applicant raises them. Similarly, questions relating to disability should not be discussed until a decision is made that the applicant is otherwise qualified and will be offered the position subject to the applicant's ability to demonstrate that he or she can perform the essential functions of the position with reasonable accommodation. See Sections 3.11.5, 15.12 to 15.12.7.

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

3.11.1.7 Nondiscriminatory Work Environment. As an employer, the State has a responsibility to create a nondiscriminatory work environment. 42 U.S.C. § 2000e-2, 2000ff-1; A.R.S. § 41-1463. Supervisors should neither make nor tolerate ethnic, religious, racial, age, disability, or sexual jokes or slurs or otherwise create or tolerate a hostile, intimidating, or offensive work environment. Supervisors should take disciplinary action up to and including dismissal against employees for such conduct. Failure to provide a harassment-free environment may create liability for the State and the individuals involved. See, e.g., Sections 3.11.3.1, 15.7.2, 15.10.

3.11.1.8 Affirmative Action. “Affirmative action” is generally defined as “a set of actions designed to eliminate existing and continuing discrimination, to remedy the lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.” Black’s Law Dictionary 60 (7th ed. 1999). Certain federal and state laws may obligate an employer to provide affirmative action plans. See Sections 15.16, 15.16.1. For example, such affirmative action obligations may arise from federal contracts or from the receipt of federal funds under the Rehabilitation Act of 1973. See 29 U.S.C. §§ 793, 794. If an agency believes that any provision of this type applies, it should contact legal counsel.

3.11.2 Race, Color, and National Origin Discrimination. An employment decision cannot be based on an applicant’s or employee’s race, color, or national origin, and employees cannot be treated differently on any of these bases. 42 U.S.C. § 2000e-2; A.R.S. § 41-1463; see also Sections 15.4, 15.5. All applicants, employees, and clients must receive equal consideration and treatment without regard to their race, color, or national origin. Any employee who violates these principles subjects himself or herself, the agency, and the State to legal liability. See Section 13.3. Furthermore, any employee who violates these principles may be subject to disciplinary action, including dismissal. See, e.g., A.A.C. R2-5-501(A).
3.11.3 Sex Discrimination. An employment decision may not be based on an applicant’s or an employee’s sex. 42 U.S.C. § 2000e-2; A.R.S. § 41-1463; see also Sections 15.7, 15.7.1, 15.7.2. Sex discrimination includes discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k); A.R.S. § 41-1463; see also Section 15.7.1. In addition, an employer may not pay an employee of one sex less than it pays an employee of the opposite sex when the two perform substantially equal work. 29 U.S.C. § 206(d) (see Section 15.8 for a more detailed discussion of this federal statute).

Dress codes and hair-length requirements generally are not considered sex discrimination even though different standards may be applied to males and females. Jesperson v. Harrah’s Operating Co., 444 F.3d 1104, 1109-10 (9th Cir. 2006). However, dress codes that prescribe uniforms for females while specifying “normal business attire” for males have been found to be unlawful as perpetuating sexual stereotypes. Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028, 1029-30 (7th Cir. 1979).

3.11.3.1 Sexual Harassment. It is unlawful to use one’s position to obtain sexual favors or to imply that any term or condition of employment depends upon or is related to the receipt of sexual favors. See Section 15.7.2. Requests for sexual favors or verbal or physical conduct of a sexual nature that has the purpose or effect of interfering with an employee’s work performance or creating an intimidating, hostile, or offensive environment are likewise unlawful. See id; Section 3.11.1.7. Sexual harassment is cause for discipline up to and including dismissal. Supervisors who are aware that sexual harassment is occurring but who take no action to stop it may be subject to disciplinary action as well as to legal liability. If the problem is so widespread that, for example, supervisory employees should have known of the conduct, the employer may be liable even though no employee has specifically complained. See Section 15.7.2.

Every state agency should promulgate a formal policy prohibiting sexual harassment. The policy should incorporate the EEOC guidelines at 29 C.F.R. §§ 1604.1 to 1604.11. The agency should also develop a training program that explains the various forms of sexual harassment, the agency policy prohibiting it, and the procedure for reporting incidents.

3.11.4 Religious Discrimination. Actions by state employees that either promote the establishment of a specific religion (or religion in general) or prohibit or interfere with the free exercise of religion violate both the Federal and State Constitutions. See Section 15.6. Accordingly, all applicants, employees, and clients of the State must be treated equally and without regard to the presence or absence of religious belief.

When an employee’s religious beliefs conflict with his or her job responsibilities, the employee has a responsibility to alert his or her supervisor. The supervisor then has a duty
to “reasonably accommodate” the employee’s religious beliefs. Such accommodation might include a change in the employee’s work schedule or a modification of the employee’s responsibilities. However, the employer need not incur more than minimal costs or permit the observance of religious tenets if to do so would unreasonably interfere with the performance of the agency’s responsibilities and create undue hardship. 42 U.S.C. § 2000e(j); A.R.S. § 41-1461(13); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977); see also Section 15.6.

The reasonable accommodation required for religion is less than that required for a disability or handicap. See Sections 3.11.5, 15.12.1. Supervisors should keep detailed records of each religious conflict brought to their attention and all steps taken to accommodate the religious belief. Such records should be kept separate from the employee’s personnel file. If problems arise in this area, the agency should consult with employment counsel.

3.11.5 Disability and Handicap Discrimination. The Americans with Disabilities Act (“ADA”) prohibits discrimination against a “qualified individual with a disability.” 42 U.S.C. § 12112. A “qualified individual with a disability” is a person who has a disability, but who can, either without any accommodation or with a reasonable accommodation, “perform the essential functions of the employment position.” 42 U.S.C. § 12111(8). The language of the Arizona Civil Rights Act parallels that of the ADA, forbidding discrimination against a “qualified handicapped individual” who, with or without reasonable accommodation, can perform the position’s essential functions. A.R.S. §§ 41-1461(11), -1463(L). The ADA and the Arizona Civil Rights Act do not apply if no accommodation will enable the employee to perform an essential function of a job. The questions of whether an individual is disabled, whether an accommodation is reasonable, and whether a function is essential are determined on a case-by-case basis, taking into consideration all relevant factors. Thus, if an agency has a question regarding the applicability of either federal or state disability law, it should contact legal counsel.

Certain federal statutes may oblige the State to take affirmative action to employ and advance qualified individuals with handicaps. See 29 U.S.C. §§ 793, 794; see also Sections 15.12 to 15.12.7. The affirmative action requirements may include taking reasonable steps to modify tests, examinations, and job responsibilities or obtaining specialized equipment that will permit applicants or employees with handicaps to perform the job in question. See id.

3.11.6 Age Discrimination. The Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634, and the Arizona Civil Rights Act, A.R.S. § 41-1463, prohibit age discrimination. The age discrimination prohibitions are limited to individuals who are at least forty years of age. In general, an agency cannot make decisions to hire, promote, or discharge based upon an applicant’s or employee’s age. See Section 15.11.
An agency can require that applicants and employees meet the requirements of performing a particular job, provided that all applicants and employees are required to demonstrate that they can meet those requirements and that the same test or evaluation procedures are applied to each applicant or employee regardless of age. See Sections 15.11, 15.11.1, and 15.25 for a more thorough analysis of the law in this area.

3.11.7 Genetic Information Discrimination. The Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff, prohibits discrimination based on genetic information. Genetic information includes information about an individual’s or an individual’s family members’ genetic tests, as well as information about an individual’s or an individual’s family members’ participation in genetic services or research. Genetic information also includes information about an individual’s family medical history. An agency may not use genetic information in making employment decisions, including those involving hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. Under GINA, employers cannot request, require, or purchase genetic information and the disclosure of genetic information is strictly limited.

3.11.8 Discrimination Grievances. An employee may submit a grievance alleging discrimination in accordance with the agency’s grievance procedures. See R2-5-701, -702. Any employee who is not satisfied with an agency head’s decision on a grievance alleging discrimination may submit the grievance to the Director of the Department of Administration. See R2-5-702(A)(11), (B)(1). Any employee who has a complaint alleging discrimination that A.R.S. § 41-1463 prohibits and who is not satisfied with the final grievance resolution will be referred to the appropriate agency by the Director. R2-5-702(D).

3.12 Workers’ Compensation.

3.12.1 Workers’ Compensation Defined. The workers’ compensation system strives to compensate individuals who are injured on the job. See generally A.R.S. Title 23, Chapter 6, Workers’ Compensation. The State of Arizona is a self-insured entity. Workers’ compensation benefits for state employees are provided through the Arizona Department of Administration, Risk Management Division. The workers’ compensation system is a “no fault” system. See, e.g., A.R.S. § 23-1021. Therefore, neither the negligence of the worker nor the negligence of the employer is considered in assessing the compensability of an injured worker’s claim. With rare exceptions, an injured State worker cannot recover in tort against the State because workers’ compensation is the exclusive remedy. See A.R.S. §§ 23-906(A), -1022(A).

3.12.2 Workers Covered by the Workers’ Compensation System. Under Arizona’s workers’ compensation law, an injured worker bears the burden of proving a
compensable industrial injury. See, e.g., Lapare v. Indus. Comm’n, 154 Ariz. 318, 319, 742 P.2d 819, 820 (App. 1987). Generally, the injured worker is required to establish that (1) the worker is an employee covered under the workers’ compensation law, (2) the injury or illness arose out of his or her employment, and (3) the injury or illness occurred within the course and scope of his or her employment.

3.12.3 Employer Responsibility for Notification of Industrial Injuries of Employees. Upon receiving notice that a state employee has sustained an industrial injury, the employer must within ten days file an “Employer’s Report of Industrial Injury” with both the Arizona Industrial Commission and Risk Management. A.R.S. § 23-1061(E) If a fatality occurs, the employer must immediately notify the Industrial Commission and Risk Management. A.A.C. R20-5-110.

3.12.4 Risk Management’s Role. The State of Arizona is a self-insured entity for workers’ compensation liability. Risk Management must accept or deny a claim within twenty-one days of receiving notification of the claim from the Arizona Industrial Commission. A.R.S. § 23-1061(M). If a claim is accepted, Risk Management may be responsible for paying medical, surgical, and hospital benefits; temporary compensation benefits; and permanent compensation benefits. Risk Management is responsible for administering state industrial claims.

3.12.5 The Attorney General’s Role. Assistant Attorneys General defend State agencies and Risk Management in statewide litigation before the Arizona Industrial Commission Administrative Law Judge Division and at the Arizona appellate courts. They work closely with and provide legal advice to Risk Management adjusters regarding the proper processing of claims, claim settlement and subrogation issues, and related legal matters.
Form 3.1

ADMINISTRATIVE LEAVE PENDING INVESTIGATION

(Section 3.8.7)

(Date)

Ms. Sally Q. Employee
1234 Anywhere Road
Tucson, Arizona 85000

Dear Ms. Employee:

This letter is official notice that in accordance with Department of Administration Personnel Rule R2-5-409, you have been placed on Administrative Leave with Pay pending the results of an investigation. Your leave will begin at (time) __.m., on (date) __, and will 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 the conduct of state service employees. You will continue to accrue all rights and benefits as an employee.

During your leave, you are directed to remain at your residence during the regular work hours of 8:00 a.m. to 5:00 p.m. You must be available to provide information or services during these hours as directed by your supervisor. You must call your supervisor each work day between 8:00 a.m. and 8:30 a.m. You may leave your residence during your lunch break from 12:00 noon to 1:00 p.m. To leave your residence at any other time during the regular work hours cited above, you must request sick leave or annual leave. If your supervisor approves your request for sick leave or annual leave, you may leave your residence during the approved leave period.

You may be contacted at your residence during the regular work hours of 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. If you are not at your residence and your supervisor has not approved sick or annual leave for this time, you will be considered to be absent without leave and will be given leave without pay. Furthermore, you may be disciplined.
Failure to comply with all of the directives in this letter will subject you to disciplinary action.

Sincerely,
(Name)
(Title)

cc: Office Administrator
Form 3.2

RETURN FROM ADMINISTRATIVE LEAVE

(Section 3.8.7)

(Date)

Ms. Sally Q. Employee
1234 Anywhere Road
Phoenix, 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) ____ .m. Your reporting place is ____ (location) ____.

Sincerely,

(Title)

cc: Office Administrator
Form 3.3

DEMOTEION FOR CAUSE—COVERED EMPLOYEE

(Section 3.3.3)

(Date)

Ms. Sally Q. Employee
1234 Anywhere Road
Phoenix, Arizona 85000

Dear Ms. Employee:

This letter is 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 A.A.C. R2-5-802 for “cause” as outlined in A.R.S. § 41-770 and A.A.C. R2-5-501.

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 as follows:

1. On January 3, 1999, patient __________ 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]
2. On November 3, 1999, 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

3. [Include discussion of prior corrective and disciplinary action.] You have been counseled orally six times between July 1, 1997, and July 28, 1998, about the necessity of following physicians’ instructions and correctly charting. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

[If you do not list the specific violations of statute, personnel rules or agency policies after each charge, then state the following here: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

It is our belief that you need 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 that is in harmony with your need for close supervision.

You have the right to appeal this demotion if you wish. Your appeal must be made in writing to the State Personnel Board, 1400 W. Washington, Ste. 280, Phoenix, Arizona, 85007. You must file your appeal within ten working 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,

Director/Deputy Dir./Assistant Dir.
(Person With Actual or Delegated Authority)

cc: Employee Personnel File
Agency Personnel Manager
I, [employee’s signature], acknowledge receipt of this Notice of Demotion for Cause on [date].
Form 3.4

DISMISSAL—PERMANENT STATUS STATE EMPLOYEE

(Section 3.3.4)

(Date)

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

Dear Mr. Employee:

This letter is notice of your dismissal from the Department of Economic Security effective (date) at _____ ___.m.

This action is taken under the authority of Department of Administration Personnel Rule R2-5-803 for “cause” as outlined in A.R.S. § 41-770 and Department of Administration Personnel Rule R2-5-501, Standards of Conduct.

[Include a statement that includes the employee’s official class title and length of total state service and specifies how, because of this background, the employee should have been aware that his actions were inappropriate. See example below.]

As a Public Assistance Eligibility Interviewer II, Grade 15, with the Office of 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. On the first page of the DES New Employee Handbook that you signed (date) you attested that you are aware of your responsibility to adhere to the rules, policies, procedures, and statutes referred to in the handbook, as well as to all others that govern your conduct and performance as a state service employee.

The specific reasons for your dismissal are:
1. On January 5, 1999, at about 10:00 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

[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 the public and 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.]

2. On January 8, 1999, you were directed to process seven requests for hearing. You objected to this assignment. At 5:00 p.m. the seven hearing requests were discovered in your wastebasket. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

3. On January 9, 1999, at about 3:00 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)]

[If you do not list the specific violations of statute, personnel rules or agency policies after each charge, then state the following here: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.)] 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, 1998, 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 16, 1998, 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 1998 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 action under A.R.S. § 41-785 if you wish. Your appeal must be made in writing to the State Personnel Board, 1400 W. Washington, Ste. 280, Phoenix, Arizona, 85007. If you choose to appeal, your appeal within ten working days from the date of this dismissal and must state the facts upon which your appeal is based, along with the action you request of the Personnel Board.

Sincerely,

(Name)

cc: Employee Personnel File
Office Administrator
State Personnel Board
Office of the Attorney General, Employment Law Unit

[NOTE: If the employee is on Promotional Probation and the Employee is going to be reverted prior to the dismissal, the dismissal letter should contain a statement such as the following to ensure that the termination is completed effectively: “You are reverted to your permanent status position and you are terminated from your permanent status position.”]
Form 3.5

DISMISSAL—UNCOVERED EMPLOYEE

(Date)

Ms. Sally Q. Employee
4321 Anywhere Road
Tucson, Arizona 85000

Dear Ms. Employee:

This letter is official notice that your services are no longer needed by the Department of ________________, effective ____(date)____ at ________ __.m.

As an uncovered employee, you have no right to appeal this action. Please return all state property immediately.

Sincerely,

Board or
Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager
Form 3.6

DISMISSAL—ORIGINAL PROBATIONARY EMPLOYEE

(Section 3.2.3)

(Date)

Ms. Sally Q. Employee
4321 Anywhere Road
Tucson, Arizona 85000

Dear Ms. Employee:

This letter is notice of your dismissal as an original probationary employee from employment with the Department of _________________. You are dismissed effective ___________ at _______ ___.m.

This action is taken under the authority of Department of Administration Personnel Rules A.A.C. R2-5-213(C) 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 A.A.C. R2-5-803.

Please return all state property immediately.

Sincerely,

Board
Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager
Ms. Sally Q. Employee
4321 Anywhere Road
Tucson, Arizona 85000

Dear Ms. Employee:

This letter is official notice of your dismissal from the Office of the Attorney General, effective (date) at ____ __.m.

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

Sincerely,

(Name)

cc: Human Resources for Employee Personnel File
Office Administrator
Ms. Sally Q. Employee
4321 Anywhere Road
Tucson, Arizona 83000

Dear Ms. Employee:

This is to inform you that your [seasonal or temporary] assignment will be ending on August 29, 1999, at 5:00 p.m. Your efforts in assisting this office in meeting its objectives have been fully noted and appreciated.

[Following sentence is optional: Please note that as a (seasonal or temporary) employee, your job performance has been recorded as (satisfactory or excellent).]

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

Sincerely,

(Name)
(Title)

cc: Human Resources for Employee Personnel File
Office Administrator
Form 3.9

MEDICAL CERTIFICATION REQUIREMENT

(Section 3.8.3)

(Date)

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

Dear Ms. Employee:

On June 1, 1999, you called your supervisor and reported that you were sick and could not come to work. On that same day, you were observed having lunch with a group of people at a local restaurant.

A review of your sick leave usage also reveals some irregularities. In the past six months, an unusual number of your sick leave days occurred on Fridays. You have also commonly taken sick leave the day following a holiday weekend.

You are hereby reminded that sick leave may be used only for the reasons listed in A.A.C. R2-5-404(A), a copy of which is enclosed for your reference. Abuse or misuse of sick leave can result in discipline up to and including dismissal.

You are advised that for the next six months, sick leave requests will not be granted unless accompanied by medical certification that your absence was for one of the reasons set forth in A.A.C. R2-5-404(A). Such medical certification will not be placed in your personnel file and will be shared only with those individuals who have a need to know. A sick leave certification form is enclosed and may be photocopied if you need additional forms.

Sincerely,

Supervisor

cc: Supervisor's File

Enc.: R2-5-404 Certification Form
Medical Certification for Sick Leave

I, (Name of Health Care Provider), hereby certify that (Employee) was absent from work on ________ to _________ due to:

☑ Illness or injury that rendered the employee unable to perform the duties of his/her position;

☑ Examination or treatment by a licensed health care practitioner;

☑ Illness, injury, examination, or treatment by a licensed health care practitioner of the employee’s spouse or dependent child.

(Signature of Health Care Provider)

_____ (Date)
CONFIDENTIAL

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

Dear Ms. Employee:

You are employed as a Personnel Analyst II (Classification Specialist). As a Classification Specialist, it is your responsibility to work with various agency management personnel to determine proper job titles and salary grades. Essential functions of this position include ____________________________________.

Your recent job performance demonstrates that you may be unable to perform the essential functions of your position for medical reasons. You have been employed in this position for two years. During that time, your performance evaluations reflect that you have been performing satisfactorily with respect to both the quantity and quality of your work. Within the last thirty days, your performance has dramatically changed. You have uncharacteristically missed important deadlines, and your work has demonstrated an unusual number of careless errors. In addition, you have lost your temper and raised your voice to coworkers on several occasions. In one of these altercations, you told a coworker that he “had better hope you never find him in a dark alley somewhere.” On March 12, your supervisor observed you sleeping at your desk. When your supervisor discussed these issues with you, you indicated that you were having some serious personal problems.

The state personnel rules provide that an employee may be referred for a medical examination at the employer’s expense to determine whether the employee is medically fit to perform his or her job. A.A.C. R2-5-404(D)(3).

You have been scheduled for an appointment with Dr. Psychiatrist on May 15, 1999, at 2:00 p.m. Dr. Psychiatrist is located at 111 West Capitol Lane, Phoenix, Arizona. Dr. Psychiatrist’s telephone number is (602) 222-2222. The time for this appointment and travel to and from the examination is considered work time, so there will be no deduction
from your sick leave or annual leave. Transportation can be provided at no cost upon request.

After the examination, Dr. Psychiatrist will provide the agency with a report indicating whether, in his opinion, you are able to perform the essential functions of your position as a Personnel Analyst. This information will be reported to me and shared only with those who need to know. No information concerning this medical examination, including this letter, will be placed in your personnel file.

Your failure to appear for this examination will be considered insubordination, i.e., refusal to follow a direct work order, and may result in disciplinary action up to and including dismissal from state service. See A.R.S. § 41-770; A.A.C. R2-5-501.

Sincerely,

Director/Deputy Director/Asst. Director

I, ___ (Employee Signature)___, acknowledge receipt of this Order for Medical Examination on ___(date)____.

cc: Employee Medical File
Dear Dr. Psychiatrist:

(Employee) is being referred to your office for a fitness–for-duty evaluation. The employee works as a Personnel Analyst II. A current job description for that position is being provided for your reference. In addition, we are providing you with an essential functions matrix showing the job duties and tasks considered essential to the performance of this job.

After the examination, please provide us with a report discussing the employee's ability to perform the essential functions of the position. If the employee has limitations that affect the ability to perform the essential functions, please let us know the extent of the limitations and the prognosis for those limitations. In addition, please include in your report whether or not the employee's presence in the workplace or continued performance of the described duties could pose a risk to the safety of the employee or any other employee.

[Use if the referral is for an assessment of propensity for violence]

(Employee) is also being referred to you for an examination and assessment of the employee's propensity for violence in the workplace. This referral is being made based on the following incidents:

1. Employee received a poor performance evaluation from his supervisor. During the meeting, the employee said that he was not going to fight the evaluation and that the supervisor would get what was coming to him.

2. The day after this confrontation, the employee placed a newspaper clipping on the supervisor's desk. The clipping referred to a workplace shooting in Nebraska. The employee wrote, “thought you would find this interesting” on the clipping.
3. Employee affixed a National Rifle Association sticker to his computer terminal and has been observed reading gun magazines during his lunch hour.

4. Employee bragged to coworkers about chasing some teenagers off of his property with his shotgun.

5. Employee has started carrying a large duffel bag to and from work that appears to be heavy.

6. Employee has been observed crying at his desk on two separate occasions.

Please include in your report an assessment of this employee’s propensity for violence and your assessment of whether allowing this employee to remain in the workplace poses a threat to the employee or to others.

Sincerely,

Director/Dep. Dir./Ass’t. Dir.

cc: Employee Medical File
TO: Employee

FROM: Supervisor

RE: MEMORANDUM OF CONCERN

DATE: (Date)

This Memorandum of Concern is to confirm our verbal discussion in my office on (date), concerning your tardiness and your attitude toward supervision. The purpose of the meeting was to develop a complete understanding between us as to what behavior is acceptable and to point out two specific areas in which you must improve.

The shop hours are 7:30 a.m. to 11:30 a.m. and 12:00 m. to 4:00 p.m. You and all other shop employees are expected to be here at those times. Your frequent tardiness disrupts planning and scheduling in the shop and is not fair to other employees.

Your habit of contradicting my instructions to other shop employees on work procedures and your use of profanity toward me and other supervisors is unacceptable. If you have suggestions you want to make, I’ll be glad to consider them, but you will not countermand my instructions to other employees.

The problem areas addressed in this Memorandum of Concern detract from your performance and are contrary to [cite statutory subsections, rules or policies violated]. If these problems continue, they will have to be addressed further through the Department's disciplinary process. If there is any way that I can assist you in remedying these concerns, please feel free to contact me.

Sincerely,

Supervisor
I, (employee signature), acknowledge receipt of this Memorandum of Concern on (date).

[NOTE: A copy does not go in the employee’s personnel file but is retained by the supervisor.]
Form 3.13

MEMORANDUM OF CONCERN—OPTION NO. 2

(Section 3.3.1)

TO: Employee
FROM: Supervisor
SUBJECT: January 6, 1999, Meeting
DATE: (Date)

Your recent actions and your manner in performing routine office clerical tasks led us to hold a meeting with you on January 6, 1999. We now follow up that meeting with this memorandum confirming those items of concern discussed and setting forth what management expects from you.

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 has a high number of office and interoffice contacts with all divisions in the agency. Another significant characteristic of this office is that the general public frequently comes into the office to seek guidance on processing their applications and licenses.

On January 6, 1999, at 1:30 p.m., the following individuals attended a meeting in the District Manager’s office to explain to you the need for corrective action in your daily work performance:

(Administrator of the area)
(Employee’s Supervisor)
(An Impartial Observer)
(Affected Employee)

During the meeting, you were clearly advised that your performance is substandard for the following reasons:

1. You have discourteously interrupted meetings and conferences. [Cite examples]
2. You have wasted time by needlessly and excessively visiting and discussing private business. [cite examples]

3. You have failed to accomplish work on time. [cite examples]

4. You have displayed a lack of interest in your job. [cite examples]

5. You have prepared correspondence in a sloppy and unbusinesslike manner. [cite examples]

6. You have lacked attention to detail and lacked accuracy in performing regular daily tasks. [cite examples]

After discussion of these items, I informed you that your work would be closely monitored and that if you did not correct the deficiencies noted in a satisfactory manner, some form of disciplinary action, up to and including possible dismissal, would result.

This is the first formal meeting with you about this subject. However, an informal discussion outlining similar deficiencies took place in November of 1998. 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. If you have any questions about the Department’s expectations, or if there is any way that I can assist you in remedying these concerns, please feel free to contact me.

Sincerely,

Supervisor

I, __________ (employee signature) __________, acknowledge receipt of this Memorandum of Concern on __________ (date) __________.

[NOTE: A copy does not go in the employee’s personnel file but is retained by the supervisor.]
Mr. John Q. Employee  
5678 West Anywhere Lane  
Flagstaff, Arizona 85000

Dear Mr. Employee:

This letter is notice of charges of misconduct. Pursuant to Department of Administration Rule R2-5-803(A), the purpose of this letter is to provide you with the following:

1. Notice of allegations set forth below. Disciplinary action up to and including dismissal is being considered based on these allegations, which constitute cause for disciplinary action as outlined in A.R.S. § 41-770 and Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).

2. An opportunity to respond to the allegations and present facts that are pertinent to them.

3. To provide you with an opportunity to inform the Department of any and all mitigating circumstances that you feel should be considered prior to deciding what, if any, disciplinary action should be taken.

As a Public Assistance Eligibility Interviewer II, Grade 15, with the Department of Economic Security who has eighteen 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. On the first page of the DES New Employee Handbook that you signed on ___(date)___, you attested that you were aware of your responsibility to adhere to the rules, policies, procedures, and statutes referred to in the handbook, as well as all others that govern your conduct and performance as a state service employee.
During your term in state service, you have received a verbal warning for using obscene language, a written reprimand for threatening to destroy another employee’s personal property, and a one-week suspension. On each occasion, you were advised that further misconduct on your part would result in more severe disciplinary action.

The specific charges and explanations are as follows:

1. On January 5, 1999, at about 10:00 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.).]

[Include any additional information that would show the seriousness of the action. For example: You made the statement in the client reception area in front of clients and other employees, thereby showing disrespect for the public and 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 actions.]

2. On January 6, 1999, at about 3:00 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. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.).]

3. On January 9, 1999, you were directed to process seven requests for hearing. You objected to this assignment. At 5:00 p.m., the seven hearing requests were discovered in your wastebasket. [You may place the following sentence here, after each charge, or as a separate paragraph at the end of all of the charges: Your actions violated (cite specific statutory subsections, personnel rules or agency policies.).]
[If you do not list the specific violations of statute, personnel rules or agency policies after each charge, then state the following here: Your actions violated (cite specific statutory subsections, personnel rules or agency policies).]

You may submit a written response to each specific allegation and include appropriate documentation to refute the charges. If you chose to provide a response, the response must be delivered to the office of [name and title] at [address], by [date and time].

Sincerely,

(Name)
(Title)

cc: Employee Personnel File
Agency Personnel Manager
Office of the Arizona Attorney General, Employment Law Unit
Mr. John Q. Employee  
5678 West Anywhere Lane  
Flagstaff, Arizona 85000  

Dear Mr. Employee:  

This letter is notice of a charge (or charges) of misconduct. Pursuant to Department of Administration Rule A.A.C. R2-5-803(A), the purpose of this letter is to provide you with the following:  

1. Notice of the allegation(s) set forth below. Disciplinary action up to and including dismissal is being considered based on these allegations, which constitute cause for disciplinary action as outlined in A.R.S. § 41-770 and A.A.C. R2-5-501.  

2. An opportunity to respond to the allegations and present facts that are pertinent to them. DOA Personnel Rule A.A.C. R2-5-803(A) requires that you submit your response within three working days after you receive this notice.  

3. To provide you with an opportunity to inform the Department of any and all mitigating circumstances that you feel should be considered prior to deciding what, if any, disciplinary action should be taken.  

The specific charges and explanations are as follows:  

You have not reported to work since (date), and you have not contacted this office to offer a reason for your absence.  

Because you have not provided a properly completed leave request, per policy, I have no choice but to notify you that the days on which you have been absent from work are being carried as unauthorized leave without pay.
Your unexcused absence and failure to appear for work are deemed job abandonment and constitute grounds for disciplinary action up to and including dismissal under [cite statutory subsections, rules and policies].

If you choose, you may submit a written response to each specific allegation and include appropriate documentation to refute these charges. If you choose to provide a response, the response must be delivered to the office of [name and title] at [address] by [date and time].

Sincerely,

Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel manager

[NOTE: Must send notice to addressee by certified mail, return receipt. May send copies of notice to other individuals either by certified mail, return receipt, or by regular mail.]
Form 3.16

RESIGNATION

(Section 3.7.1)

(Date)

Employer's Name
Employer's Address

Dear Employer:

I hereby submit my resignation from my position as ___________ ___________ with the Arizona Department of _________________, effective ___(date)____.

Sincerely,

(Name)

[Write letter either confirming that resignation has been accepted or informing that it has been rejected.]
Form 3.17

RESIGNATION—ACCEPTANCE OF VERBAL RESIGNATION
(COVERED EMPLOYEE)

(Section 3.7.1)

(Date)

Ms. Sally Q. Employee
4321 Anywhere Road
Phoenix, Arizona 85000

Dear Ms. Employee:

This letter confirms the agency’s acceptance of your verbal resignation from the Department of ________________, effective ______________ at ____________ __.m.

This resignation is accepted under the authority of Department of Administration Personnel Rule A.A.C. R2-5-901(A) and (B), which states as follows:

A. General. An employee may terminate employment with the state service by submitting a written resignation to the agency head at least ten working days prior to the effective date of the resignation. Unless the Director determines that the employee had good cause for not giving such notice, an employee who fails to give such notice shall not be eligible for reinstatement.

B. Oral Resignation. If an employee resigns orally, the agency head shall confirm the resignation in writing.

[If appropriate] Because you failed to provide written resignation at least ten working days prior to the effective date of your resignation, your resignation is accepted with prejudice, and you do not have reinstatement rights.

Sincerely,

Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager
Form 3.18A

RESIGNATION—IN LIEU OF DISMISSAL

(Section 3.7.1, 3.7.3)

(Date)

Employer’s Name
Employer’s Address

Dear 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.

Sincerely,

(Name)

Do not use this prior to seeking legal advice.

[Write letter confirming that resignation in lieu of dismissal has been accepted.]
Ms. Sally Q. Employee  
4321 Anywhere Road  
Phoenix, Arizona 85000

Dear Ms. Employee:

This is to confirm our discussion on (date). You were informed that the Attorney General's Office no longer requires your services. We have agreed to allow you to substitute a resignation letter in lieu of termination. Our acceptance of the resignation letter is conditioned upon your compliance with the terms of our understanding.

We agreed that your last work day will be (date). You will remove all of your personal items from the office by the end of this day. You will turn in your identification badge to your supervisor and inform your supervisor of all current passwords you use for your computer or any other state equipment by 4:00 p.m. on (date).

We have agreed to allow you to use annual leave from _______ to _______. No other type of leave will be authorized for that period.

After your last work day of _______, you are not authorized to perform any work for the Attorney General's Office. If you are contacted by anyone referencing cases or other work at the Attorney General's Office, you are to direct the person to call ___________.

If you have any questions, you are directed to call your supervisor. If you believe that for any reason you must return to the office during the period of annual leave, contact your supervisor to coordinate the visit to the office.

For the purpose of issuing your final check, the operative final employment date will be the last day of annual leave, _________________.

Sincerely,

Name
Title

cc: Employee Personnel File
Agency Personnel Manager
Form 3.19

REVERSION—FAILURE TO COMPLETE PROMOTIONAL PROBATION

(Section 3.6.1)

(Date)

Ms. Jane Employee
3333 West 33rd Drive
Flagstaff, Arizona 83000

Dear Ms. Employee:

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

You will be reverted from ___ (class title) __, ___ (grade) __, ___ (position #) ___ to ___ (class title) __, ___ (grade) __, ___ (position #) __, effective ___ (date) __. Your new monthly gross salary will be $___________. You will report to ___ (Supervisor’s name) __ on ___ (date and time) __ located at ________________________________.

Sincerely,

(Name)
(Title)

cc: Employee Personnel File
Agency Personnel Manager
Form 3.20

SEPARATION WITHOUT PREJUDICE
FOLLOWING EXTENDED LEAVE—FAILURE TO RETURN

(Section 3.8.9)

(Date)

Ms. Sally Q. Employee
4321 Anywhere Road
Phoenix, Arizona 85000

Dear Ms. Employee:

You have been on extended leave without pay since ___(date)__. The last day of authorized leave without pay was ___(date)__. No extension of your leave without pay has been granted. You have not submitted a resignation, and although a position was available, you failed to return to work on ___(date)__. Therefore, we consider you to have resigned, and you are separated without prejudice.

You may have reinstatement rights as provided in the Department of Administration Personnel Rules, A.A.C. R2-5-101 through A.A.C. R2-5-904. Contact your insurance liaison at ___(phone number)___ regarding insurance benefits.

Sincerely,

Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager

[Before issuing this letter, ensure that any obligations under the personnel rules, the Family and Medical Leave Act, and the Americans with Disabilities Act have been met.]
Form 3.21

SEPARATION WITHOUT PREJUDICE FOLLOWING EXTENDED LEAVE—
INABILITY TO RETURN

(Section 3.8.9)

(Date)

Ms. Sally Q. Employee
4321 Anywhere Road
Phoenix, Arizona 85000

Dear Ms. Employee:

You have been on extended industrial leave since _(date)__. We understand that you are not able to return. We have also been notified that you have picked up your medical insurance through state retirement and have been accepted for long-term disability.

Therefore, we consider you to have resigned and you are separated without prejudice.

You may have reinstatement rights as provided in the Department of Administration Personnel Rules, A.A.C. R2-5-101 through A.A.C. R2-5-904.

Sincerely,

Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager

[Before issuing this letter, ensure that any obligations under the personnel rules, the Family and Medical Leave Act, and the Americans with Disabilities Act have been met.]
Form 3.22

SEPARATION WITHOUT PREJUDICE FOLLOWING EXTENDED LEAVE—POSITION NOT AVAILABLE

(Section 3.8.9)

(Date)

Mr. John Q. Employee
5678 West Anywhere Lane
Flagstaff, Arizona 85000

Dear Mr. Employee:

You have been on extended leave without pay since ___(date)__. The last day of authorized leave without pay was ___(date)__. No extension of your leave without pay has been granted. There was no funded position available on ___(date)__, the day you were scheduled to return to work.

Therefore, you are considered to have resigned and are separated without prejudice.

You may have reinstatement rights as provided in Department of Administration Personnel Rules, A.A.C. R2-5-101 through A.A.C. R2-5-904. Contact your insurance liaison at ___(phone number)___ regarding insurance benefits.

Sincerely,

Director/Deputy Dir./Assistant Dir.

cc: Employee Personnel File
Agency Personnel Manager

[Before issuing this letter, ensure that any obligations under the personnel rules, the Family and Medical Leave Act, and the Americans with Disabilities Act have been met.]
Ms. Jane Q. Employee  
1234 Anyplace Avenue  
Anyplace, Arizona 85000  

Dear Ms. Employee:

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

The period of suspension will begin on (date and time), and will continue to (date and time) (___ hours). You are to report to work on (date and time).

This action is taken under the authority of Department of Administration Personnel Rule A.A.C. R2-5-801 for “cause” as outlined in A.R.S. § 41-770 and A.A.C. R2-5-501.

As a Journeyman Electrician with the State of Arizona, you are a fully qualified tradesman. You have completed an 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 or construction project pertaining to electrical work. In addition to the qualifications cited above, you have worked seven years in your journeyman field, primarily on construction and renovation type electrical work.

The specific reasons for your suspension are as follows:

On July 23 and July 24, you stated in public and in front of at least six witnesses that the prime contractor’s incompetency caused the power failure at the “uniform power center.” You also stated that a voltage drop was the same contractor’s fault. When questioned by the contractor to determine its role in these problems, you stated that your meter indicated a drop of 32 volts. You were asked if your meter was correct, and you stated that it was. The contractor’s meter was calibrated by “Arizona Testing Laboratories” one week before this reading and was found to read 240 volts. When the contractor asked
you to check the correctness of your meter, you became upset, raised your voice, and stated that there was nothing wrong with your meter. You further stated that it was the contractor’s fault that “things keep getting fouled up” and that the company blew up a transformer because the company “didn’t know what it was doing.”

The contractor immediately pulled the 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 manufacturer’s fault.

Your actions violated [cite statutory subsections, rules or policies violated].

Hereafter, you are to work through your Maintenance Supervisor if there are any areas of quality concern. Any further problems of this nature or violations of other statutes, rules, or policies will result in additional disciplinary action up to and including dismissal.

You do not have the right to appeal this action. However, you may use the employee Grievance Procedure if you feel that 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 A.A.C. R2-5-701 and A.A.C. R2-5-702.

Sincerely,

Director/Deputy Dir./Assistant Dir.
(Person with Authority or Delegated Authority)

cc: Employee Personnel File
Agency Personnel Manager
Form 3.24

SUSPENSION WITHOUT PAY
(Forty-one or More Hours)

(Section 3.3.2)

(Date)

Ms. Jane Q. Employee
1234 Anyplace Avenue
Anyplace, Arizona 85000

Dear Ms. Employee:

This letter is your official notice of your suspension without pay from the Attorney General’s Office.

The period of suspension will begin at 8:00 a.m., January 27, 1999, and will continue to 5:00 p.m., February 11, 1999 (56 hours). You are to report to work at 8:00 a.m., February 12, 1999.

This action is taken under the authority of Department of Administration Personnel Rule R2-5-801 for “cause,” as outlined in A.R.S. § 41-770 and Department of Administration Personnel Rule R2-5-501 (Standards of Conduct).

You have been a Secretary in state service for four years. You are aware that your responsibilities as a State employee include the necessity of requesting and receiving approval for all absences from the Office.

Specific reasons for your suspension are as follows:

From December 19, 1998, through December 23, 1998, you failed to report to work as scheduled claiming personal illness. On December 20, 1998, in a telephone conversation with your supervisor, you stated that you had attempted to receive treatment from two physicians, but that treatment was refused due to past due accounts. You indicated that you were still too ill to work and probably would not return to duty for several days. You assured your supervisor that you would see a physician on December 23, 1998, because you would receive your pay check that day. However, upon your return to work on December 27, 1998, you not only failed to provide the required documentation, but admitted that you had not been examined or treated by a physician for illness.
Fulfillment of assigned responsibilities is dependent upon reliable and conscientious employees. Furthermore, your absences from duty from December 19, 1998, through December 26, 1998, are considered unauthorized absences and have been reported to Payroll as Leave Without Pay on the time sheet.

On September 2 and October 30, 1998, you received written reprimands for absence without leave, neglect of duty, willful disobedience, and improper attitude. In the reprimands, you were advised that your unanticipated absences were having a negative impact on Office production and staff morale. Both reprimands warned that future unanticipated absences would not be approved unless you provided documentation substantiating your need to be absent. You were also warned that failure to provide such documentation would result in severe disciplinary action. Despite these warnings, you continue to miss work without prior approval and fail to provide the required documentation.

Your actions violated [cite statutory subsections, rules or polices violated]. In the future, you are directed to comply with Department policy regarding leave. Continued violation on your part or violation of other statutes, rules, or policies will result in additional disciplinary action up to and including dismissal from state service.

You have the right to appeal this suspension if you wish. Your appeal should be made in writing to the State Personnel Board, 1400 W. Washington, Ste. 280, Phoenix, Arizona, 85007. You must file your appeal within ten working days from the date of this suspension and must state with specificity the facts upon which your appeal is based, along with the action that you request of the Personnel Board.

Sincerely,

(Name)

cc: Employee Personnel File
Agency Personnel File
State Personnel Board
Office of the Attorney General, Employment Law Unit
Form 3.25

VOLUNTARY GRADE DECREASE—EMPLOYEE REQUEST

(Section 3.7.2)

TO: Name of Supervisor Making Job Offer

FROM: Employee Name and Address

SUBJECT: Voluntary Grade Decrease

DATE: (Date)

For personal reasons (OR – for the reasons listed below), I 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 a reduction in salary and that my salary will be $ __________ per year.

[Give details of reasons for voluntary grade decrease if appropriate.]

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
Ms. Jane Q. Employee
1234 Anyplace Avenue
Anyplace, Arizona 85000

Dear Ms. Employee:

This will confirm that your request for a voluntary grade decrease from a ________, grade ________, at $________ per year, to a ________, grade ________, at $________ per year, is hereby accepted.

This action is effective ________, and is in accordance with the Department of Administration Personnel Rules. Since this action is voluntary and because you have an excellent (or acceptable) record of state service, the Department of __________________ will place this letter in your personnel file to indicate that this voluntary grade decrease is not a result of disciplinary action, but was done at your request.

Sincerely,

Appointing Authority

cc: Employee Personnel File
Agency Personnel Manager
Ms. Jane Q. Employee  
1234 Anyplace Avenue  
Anyplace, Arizona 85000

Dear Ms. Employee:

This letter is a reprimand for your actions on January 6, 1999.

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

The specific reasons for this reprimand are as follows:

On January 6, 1999, at about 9:30 a.m., you permitted two juveniles under your supervision to engage in a boxing match. You did not obtain prior approval from your supervisor before allowing this activity. No protective equipment was provided to the juveniles. You did not properly document the activity for agency records.

Your actions constitute a serious violation of [cite statutory subsections, rules or polices violated]. Continued violation on your part of these or other statutes, rules, or policies will result in additional 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 that the reprimand is unjust. Grievances must be filed within ten working days after the effective date of the action being grieved. See A.A.C. R2-5-701 and R2-5-702.

Sincerely,

Supervisor

cc: Employee Personnel File  
Agency Personnel Manager
Form 3.28

REQUEST FOR INFORMATION

(Section 3.4)

TO: Agency

FROM: Employment Law Unit

RE: Case Name

DATE: (Date)

______________________________________________________________________

The employee/appellant in the above-referenced matter has filed the attached notice of appeal of the disciplinary action that your agency took. To prepare for the administrative hearing of this matter, please obtain the following information and forward it to me no later than ________________:

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

2. Please have the agency representative review a copy of the appellant’s letter and, for each factual allegation or contention stated in the letter, provide the following information, paragraph by paragraph:

   A. The names of the witnesses who will testify in support of the allegations in each paragraph, their home and work telephone numbers and, if not employed by the State, their home or business addresses.

   B. The written or physical 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. If an investigation was conducted before discipline was imposed, please arrange for a complete copy of the investigative report to be sent immediately.
C. A complete copy of the employee/appellant’s personnel file, including all prior disciplinary actions issued to the employee/appellant, and all supervisor’s files regarding the employee/appellant.

D. The names, addresses, and home and work telephone numbers of any individuals who might have additional information that would assist in preparing this case.

E. The names, addresses, and home and work telephone numbers of any witnesses who have been contacted by the employee/appellant to testify in this matter, if known.

3. If this was a dismissal, please indicate whether the employee was afforded an opportunity to resign in lieu of the disciplinary action that your agency took and whether or not your agency might consider a resignation at this time.

4. Additionally, please furnish the following information:
   A. Whether the appellant was given oral or written notice of the charges of misconduct relied upon to support disciplinary action.
   B. If such notice was given orally, indicate who conducted the meeting with the employee/appellant and when it was conducted.
   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 information requested above and forward it to me by_________. Also, please have the agency representative contact me if there are any questions.
CHAPTER 4
PUBLIC MONIES

Table of Contents

Section 4.1 Scope of This Chapter
Section 4.2 Collection of Revenues Raised by Operation of State Law
   4.2.1 Current Record of Revenues
   4.2.2 Collection of Fees
   4.2.3 Collection of Taxes, Assessments, and Claims
   4.2.4 Failure to Collect Public Monies
Section 4.3 Deposit of Monies Received
   4.3.1 Deposit in State Treasury
   4.3.2 Treasurer's Deposits and Receipts
Section 4.4 Disposition of Monies Received into the State Treasury
   4.4.1 General Fund
   4.4.2 Separate Statutory Funds and Accounts
   4.4.2.1 Statutory Revolving Funds
   4.4.3 Federal Monies
   4.4.3.1 Reimbursement from Federal Monies or Other Monies
   4.4.4 Private Monies, Contributions, and Suspense Funds
Section 4.5 Authorization to Expend Monies from State Treasury
   4.5.1 General and Special Statutory Funds
   4.5.1.1 Self-Supporting Regulatory Agency Special Funds

Revised 2011
4.5.1.2 Statutory Revolving Funds
4.5.1.3 Interagency Service Agreements
4.5.2 Federal Monies
4.5.3 Private Monies
4.5.4 Suspense Funds

Section 4.6 Authorized Expenditures
4.6.1 Classification of Appropriations
4.6.2 Allotment of Appropriations
4.6.3 Transfer of Appropriated Funds
4.6.4 Encumbrance Documents
4.6.5 Public Purpose

Section 4.7 Payment of Claims for Authorized Expenditures
4.7.1 Presentation of Claims
4.7.2 Audit and Settlement of Claims
4.7.3 Issuance and Payment of Warrants and Electronic Funds Transfer Vouchers
4.7.4 Payment of Obligations Incurred During Fiscal Year After Close of Fiscal Year

Section 4.8 Lapsing of Appropriations

Section 4.9 Administrative Adjustment of Claims
4.9.1 Claims Subject to Administrative Adjustment
4.9.1.1 Untimely Filed or Technically Defective Contract Claims
4.9.1.2 Claims for Goods or Services Received in Subsequent Fiscal Years
4.9.1.3 Claims Arising from Administratively Determined Liability

Revised 2011
4.9.1.4 Refunds

4.9.2 Payment of Claims Subject to Administrative Adjustment

4.9.2.1 Contract Claims from the Prior Fiscal Year

4.9.2.2 Contract Claims More Than One Fiscal Year Old

4.9.2.3 Contract Claims Not Exceeding $300

4.9.2.4 Contract Claims Arising from Administratively Determined Liability

4.9.2.5 Refunds

4.9.3 Claims Not Subject to Administrative Adjustment

4.9.3.1 Claims for Damages for Injury to Person or Property

4.9.3.2 Contract Claims More than Four Fiscal Years Old

4.9.3.3 Claims Against Insufficient, Lapsed Appropriations

Section 4.10 Claims for Which No Appropriation Has Been Made

Section 4.11 Unauthorized Obligations and Illegal Expenditures of Public Monies

4.11.1 Close of Fiscal Year

4.11.2 No Public Purpose

4.11.3 Lack of Appropriation

4.11.4 Illegal Expenditures

Section 4.12 Recovery of State or Public Monies Illegally Paid

Section 4.13 Criminal Liability of Custodians of Public Monies
CHAPTER 4

PUBLIC MONIES

4.1 Scope of This Chapter. This Chapter discusses the law applicable to the receipt, custody, control, and expenditure of "public monies," which are defined as "money belonging to, received or held by state . . . officers in their official capacity." A.R.S. § 35-302. That law may be found generally in Chapters 1 and 2 of Title 35, Arizona Revised Statutes. This Chapter will deal with revenues raised by operation of state law, monies received from the State's participation in programs sponsored by the United States government, 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 Arizona Department of Administration (AADOA) is directed to "keep current a completely detailed list of all sources from which monies accrue to the state." A.R.S. § 35-150(A). The list must be "classified according to the budget units and other agencies responsible for the collection of public monies" and for each of the revenue-collecting agencies must show "the various kinds of taxes, fees, permits and other public monies collected or to be collected." Id.

4.2.2 Collection of Fees. "Fees for licenses, permits, certificates of any kind and other amounts due any budget unit shall be collected at the time such licenses, permits or certificates are issued." A.R.S. § 35-143(A).

4.2.3 Collection of Taxes, Assessments, and Claims. "All other monies accruing to the various budget units or to the state . . . shall also be collected at the time services are rendered, or at the time of accrual." Id.

4.2.4 Failure to Collect Public Monies. ADOA is empowered to take any action necessary, including court action, to enforce the collection and deposit of state monies. A.R.S. § 35-150(B). Indeed, an officer or other person who neglects to collect state monies may be personally liable to the State for the amount not collected. A.R.S. § 35-143(B). 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

---

1 The term "budget unit" is defined as "any department, commission, board, institution or other agency of the state organization receiving, expending or disbursing state funds or incurring obligations against the state." A.R.S. § 35-101(7).
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 or
she could have demanded cash may be held liable to the State for the loss. Therefore,
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 to the State.

4.3 Deposit of Monies Received.

4.3.1 Deposit in State Treasury. Unless a statute specifically provides otherwise,
a state officer or employee, upon the receipt of any money in his or her official capacity,
irrespective of its source or the purpose for which it was received, must promptly deposit
the money in the state treasury. A.R.S. §§ 35-142, -146. Without express statutory
authority, no state officer or employee may hold, use, or deposit any money received in his
or her official capacity in any personal or special bank account. A.R.S. § 35-146(A).

4.3.2 Treasurer’s Deposits and Receipts. The head of each budget unit or an
authorized agent, when depositing money with the state treasurer, must use forms
authorized by the Treasurer and issued to the budget units by ADOA. A.R.S. § 35-147(A) &
(B). The deposit must be delivered to the Treasurer together with the remittance or proof
of prior deposit with the state servicing bank.\(^2\) Id. § (B). The Treasurer shall validate the
deposit and provide a confirmation to the budget units. Id. The Treasurer’s confirmation
must show the amount, the date deposited, and “a unique identifying number that will link
the deposit to accounting documents and fund details maintained in the statewide
accounting system.” Id. The administrative head of each budget unit is accountable for
each deposit. Id.

4.4 Disposition of Monies Received into the State Treasury.

4.4.1 General Fund. Unless exempted, “[a]ll monies received for and belonging to
the state shall be . . . credited to the state general fund.” A.R.S. § 35-142(A). The general
fund consists of “all money received into the state treasury except money designated by
law for other statutory funds.” A.R.S. § 35-141. “[W]hen 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 shall be deposited pursuant to
sections 35-146 and 35-147 in the state general fund.” A.R.S. § 35-148(B).

4.4.2 Separate Statutory Funds and Accounts. The separate funds and
accounts into which monies received into the state treasury should be credited are listed in
A.R.S. § 35-142(A). For example, the unexpendable principal of monies received from
federal land grants, as well as interest, rentals, and other expendable money received as
income from federal land grants, must be placed in separate funds and accounts. Id.

\(^2\) A.R.S. § 35-315 provides for a state servicing bank.
§ (A)(1), (2). 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. Id. § (A)(3). All monies collected by the Game and Fish Department are deposited in the "state game and fish protection fund." Id. § (A)(6). A number of regulatory agencies are funded through special state funds as prescribed in the statutes establishing such agencies. These special funds are not considered a part of the general fund. Id. § (A)(8).

4.4.2.1 Statutory Revolving Funds. Several agencies are funded wholly or partially through separate statutory funds in the treasury known as revolving funds. Under a revolving fund statute, certain designated monies collected by a budget unit are credited to the revolving fund when they are paid to the Treasurer. The statute establishing the fund governs and limits the purposes for which monies in the revolving fund can be spent. For example, A.R.S. § 6-135(A) establishes a Banking Department revolving fund that is administered by the Superintendent of Banks. Under that statute, investigative costs, attorney's 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 investigation and for pursuit of civil actions brought to enforce Title 6. A.R.S. § 6-135(B), (C); see Section 4.5.1.2. See also, e.g., A.R.S. § 41-2813 (establishing a revolving fund controlled by the Director of the Department of Juvenile Corrections for monies received pursuant to agreements with federal or other state governments for youth rehabilitation programs); A.R.S. § 17-261.01(A) (establishing a permanent Game and Fish Revolving Fund for making cash outlays for minor disbursements authorized by the statute).

4.4.3 Federal Monies. All monies "granted and paid to the state by the federal government shall 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).

4.4.3.1 Reimbursement from Federal Monies 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 to "deposit the monies, pursuant to sections 35-146 and 35-147, in the state general fund or the fund from which the appropriation was originally made." A.R.S. § 35-142.01. However, if the reimbursement was not noted in the appropriation act, it may nonetheless be credited to the account from which the expenditure was incurred if the head of the budget unit determines that "reimbursement within the fiscal year is necessary for operation of the budget unit and was not specifically considered and rejected by the legislature at the time of appropriating monies to the budget

3 These statutory revolving funds are distinguishable from the revolving funds that ADOA may provide to any budget unit to pay operating expense items. See A.R.S. § 35-193; Ariz. Att'y Gen. Op. I90-015.
unit.” Id. The director of the budget unit must give written notification of such a determination to the Joint Legislative Budget Committee, the Governor’s Office of Strategic Planning and Budgeting, and the State Comptroller. See also Section 4.5.2.

4.4.4 Private Monies, Contributions, and Suspense Funds. The disposition of private monies or contributions received by a budget unit for its support is governed by A.R.S. § 35-149(A). A budget unit may also receive other receipts that may be subject to refund or that have not yet accrued to the State. These "other receipts" are called "suspense funds" because their ultimate disposition is not known at the time of their receipt. See id. When depositing these “private monies or contributions" or "other receipts" with the State Treasurer, the budget unit must certify to ADOA the source of the monies, the terms and conditions under which and the purposes for which the monies were received, the names of the trustees or administrators of the funds or contributions, and the name of the person authorized to approve expenditures from each fund. Id. Each such contribution or receipt must be kept separate from all other monies in the state treasury. Id. § (B). A budget unit may receive private monies and contributions only for the support of activities that it is statutorily authorized to perform. Ariz. Att'y Gen. Ops. 78-78, I79-247.

4.5 Authorization to Expend Monies from 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 ("No money shall be paid out of the state treasury, except in the manner provided by law."); Cockrill v. Jordan, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951) (construing the quoted portion of article 9, section 5). "Salaries of state officers . . . clerks and employees, and expenses incident to the offices thereof, shall be paid from the general fund or the respective fund indicated when and as authorized in the general appropriation act or any other appropriation enacted by the legislature." A.R.S. § 35-141.

4.5.1.1 Self-Supporting Regulatory Agency Special Funds. "All monies deposited in special agency funds of self-supporting regulatory agencies . . . [for use] by such agency for administration and enforcement, shall be subject to annual legislative appropriation." A.R.S. § 35-143.01(A). 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 self-supporting regulatory agencies were authorized by statute to expend the total of the agency’s special fund. See Ariz. Att'y Gen. Op. 72-9. Self-supporting regulatory agencies are now, however, prohibited from expending more than the amount authorized annually by legislative appropriation. A.R.S. § 35-143.01(B).

4.5.1.2 Statutory Revolving Funds. Monies in special statutory revolving funds may be expended for the purposes listed in the statutes creating the funds without any
further legislative action if the statutes creating such funds also authorize expenditure of
the monies. See, e.g., A.R.S. § 35-193.02 (Department of Administration special services
revolving fund). Such statutory authorizations are deemed to be continuing appropriations.
Cf. Ariz. Att'y Gen. Op. 72-9 (holding that a now-superseded version of A.R.S. § 32-
1107(A), which provided that monies in the contractors' license fund were "appropriated to
enforce the provisions of this chapter," provided for a continuing appropriation). An agency
must examine the specific statutes establishing a revolving fund to ascertain the
restrictions on the agency's authority to expend monies from the fund. See Section
4.4.2.1.

4.5.1.3 Interagency Service Agreements. 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 absent a statute providing the contrary, any amount one
state budget unit pays to another from a special fund loses its separate character upon
payment to the payee agency and is credited to the general fund upon receipt by the payee
agency. Thereafter, the payee budget unit may expend such money only pursuant to a
legislative appropriation, unless a special fund of the payee agency has been designated
by law to receive the money or the agencies have entered into an interagency service

4.5.2 Federal Monies. Monies from a purely federal source are not subject to the
appropriation power of the legislature. Navajo Tribe v. Ariz. Dep't of Admin., 111 Ariz. 279,
281, 528 P.2d 623, 625 (1974). Therefore, any budget unit authorized by statute to accept
and expend federal monies, or otherwise participate in a federally funded program, may
expend the federal monies received without 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. See Section 4.4.3.1.

4 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.
4.5.3 Private Monies. A statute empowering a budget unit to accept private monies and contributions for the support of its statutorily authorized activities authorizes the budget unit, without a separate legislative appropriation, to expend such funds for the purposes for which the monies were received. For example, A.R.S. § 41-776 authorizes all state departments or agencies to “accept gifts and donations from public and private entities for the conduct of employee recognition programs.” Other examples include: A.R.S. § 17-231(A)(7) (authorizing the Game and Fish Commission to “[p]rescribe rules for the expenditure . . . of all funds arising from . . . gifts”); A.R.S. § 27-152.02(A)(6) (authorizing the Board of Governors of the Department of Mineral Resources to “accept gifts . . . for use pursuant to the direction of the donor”); A.R.S. § 3-107(A)(3) (authorizing the Director of the Department of Agriculture to “accept, expend and account for gifts”); A.R.S. § 41-1274 (authorizing the Joint Legislative Budget Committee to “accept and expend in the name of the legislature public and private gifts and grants”); A.R.S. § 41-1304.04 (authorizing the Legislative Council to “accept and expend in the name of the legislature public and private gifts and grants”); A.R.S. § 41-1105(A) (authorizing the Governor or either presiding officer of the legislature to “accept and expend public or private gifts, grants, donations or monies”); A.R.S. § 41-703(8) (authorizing the Director of the Department of Administration to “[a]ccept and disburse grants, gifts, donations, matching monies and direct payments”).

4.5.4 Suspense Funds. Receipts that may be refunded or returned to the sender and receipts that have not yet accrued to the State are deemed not to be state monies subject to the appropriation power of the legislature. Such receipts may therefore be refunded or returned or otherwise properly disposed of in accordance with the understanding attached to their receipt without a legislative appropriation. This conclusion is suggested by Navajo Tribe v. Dep’t of Admin., 111 Ariz. 279, 528 P.2d 623 (1974), and the cases relied on by the Navajo Tribe court. See Sections 4.4.4.

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 purpose by dividing the appropriations authorizing the expenditures of state monies into various classes or programs. 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 divide appropriations. These undivided appropriations are called "lump sum" appropriations. A budget unit is authorized 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, the Director of ADOA must approve and establish an allotment schedule detailing expenditures for a full fiscal year. A.R.S. § 35-173(B). The allotment schedule is based on the estimated annual requirement of the budget unit and distributes the available spending authority to cover the operation of the budget unit for the entire fiscal year. Id.

4.6.3 Transfer of Appropriated Funds. If a budget unit determines that the amounts that the legislature has allocated to the various expenditure classes or programs in the budget unit’s appropriations will not meet its anticipated requirements, the budget unit, with the prior approval of the Director of ADOA, may transfer funds from one expenditure class to another or between and within programs. A.R.S. § 35-173(C). Also, a budget unit, with the recommendation of the Joint Legislative Budget Committee and the approval of the Director of ADOA, may transfer funds to or from any appropriation for personal services or employee-related expenditures. Id. § (E). Except as provided in A.R.S. § 35-173 or another statute, neither the Director of ADOA 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 actual or anticipated obligations, except for gross payrolls and related employee expenses and, under procedures prescribed in the state accounting manual of ADOA, expenditures not exceeding $1,000. A.R.S. § 35-151(A). However, notwithstanding the exceptions listed in subsection A, any administrative adjustment pursuant to A.R.S. § 35-191 must be encumbered. Id. § D. The encumbrance document must be processed in the State’s accounting system before the budget unit issues a purchase order or encumbrance document to cover an obligation. Id. § (A). The budget unit processes the encumbrance document by entering it in the State’s accounting system and certifying that the proposed expenditure is authorized by appropriation and allotment and that the amount involved does not exceed the unencumbered and unexpended balance of the appropriation. Id. The statute places the burden on the person in charge of the budget unit to disallow the proposed certified expenditure if it exceeds the unencumbered and unexpended balance or if it is contrary to law. Id. If the encumbrance is found to be in order, it is submitted or electronically transmitted to ADOA’s central accounting system, which must not accept an encumbrance in excess of the appropriation. Id. ADOA "may require encumbrances for all funds of the state, except for the investment of public monies or permanent endowment funds, which are not appropriated but are held in custody by the state treasurer.” Id. § B.

4.6.5 Public Purpose. Article IX, Section 7, of the Arizona Constitution (the “Gift Clause”) prohibits the State and its subdivisions from giving or lending 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. This prohibition may apply—even though the transaction has surface indicia of public purpose—if the amount of public monies paid exceeds the value of the direct consideration to be received by the public. Anticipated indirect benefits are not consideration under the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010). Whether the Gift Clause bans a particular transaction depends upon the circumstances. The head of a budget unit who is uncertain about whether a proposed expenditure is consistent with the Gift Clause should consult legal counsel.

4.7 Payment of Claims for Authorized Expenditures. This section deals with the payment of claims of those who have sold goods or rendered services to the State. A claim is "a demand against the state for payment for either [g]oods delivered or . . . [s]ervices performed." A.R.S. § 35-101(9). "The director [of ADOA] may prescribe procedures for prepayment for goods or services if it is the industry standard or if it is in the best interests of this state." A.R.S. § 35-181.01(A). Payment of a claim is accomplished only through a warrant or electronic funds transfer voucher issued by ADOA. A.R.S. § 35-142(B) (providing that money may be withdrawn from the state treasury only for payment of such a warrant or electronic funds transfer voucher). Prior to the issuance of a warrant, a budget unit and a claimant must satisfy the statutory procedures prescribed for the payment of contractual obligations of the State. See Chapter 13.

4.7.1 Presentation of Claims. "All claims against the state for obligations authorized, required or permitted to be incurred by [a budget unit] shall be paid in accordance with procedures prescribed by the director of the department of administration." A.R.S. § 35-181.01(A). Those procedures include the presentation to ADOA 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 claim that has been made and approved contrary to the procedures established by the Director of ADOA may, in the absence of fraud or bad faith, be amended at any time during the fiscal year in which it was originally submitted so as to conform the claim to the requirements of the Director. A.R.S. § 35-181.01(B).

4.7.2 Audit and Settlement of Claims. The Director of ADOA must audit, adjust, and settle all claims against the State payable from funds of the State, unless another statute expressly authorizes some other officer to perform those functions. A.R.S. § 35-181.02(A). In auditing a claim, the Director of ADOA must determine whether funds are available for payment and whether the claim form is signed by the appropriate budget unit representative. *Id.* The Director of ADOA must also establish procedures for returning and resolving any claim for which funds are not available or the payment of which would be contrary to law. *Id.* § (B).

4.7.3 Issuance and Payment of Warrants and Electronic Funds Transfer Vouchers. After approving a claim, the Director of ADOA issues a warrant or electronic funds transfer voucher to the claimant. The warrant or voucher authorizes the State Treasurer to disburse monies in the state treasury in the amount set forth in the warrant or
voucher. A.R.S. § 35-185(A). The State Treasurer is obligated to issue a check on a state depository bank or authorize the transfer of monies by the state depository bank in payment of the warrants or vouchers. *Id.* If the state treasury lacks sufficient monies to pay a warrant or voucher presented to the Treasurer, the State Treasurer must issue, in lieu of a check, a treasurer's warrant note or notes equal to the sum of the face value of the warrants or vouchers presented for payment. *Id.;* 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. §§ 35-184(B). Under procedures established by the Director of ADOA, the Director may 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. A.R.S. § 35-186(A).

**4.7.4 Payment of Obligations Incurred During Fiscal Year After Close of Fiscal Year.** ADOA may issue warrants against appropriations made for a fiscal year for a period of one month after the close of such fiscal year to pay obligations incurred during the fiscal year, as determined by the Director of ADOA. A.R.S. § 35-190(B).

**4.8 Lapsing of Appropriations.** After expiration of the one-month period discussed in Section 4.7.4, "all balances of appropriations for the prior fiscal year shall lapse and no further payments shall be made" under the authority of the lapsed appropriations, except for those appropriations and funds specifically provided for in A.R.S. § 35-190 and for those claims subject to administrative adjustment pursuant to A.R.S. § 35-191. A.R.S. § 35-190(C). 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. *Id.* § (D). Federal monies or the balance of any special fund, private fund, or suspense fund remaining at the close of a fiscal year will not revert to the general fund unless a statute specifically provides otherwise. *Id.* § (E); Ariz. Att'y Gen. Op. 75-121.

**4.9 Administrative Adjustment of Claims.**

**4.9.1 Claims Subject to Administrative Adjustment.**

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

4.9.1.2 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 fiscal year is subject to administrative adjustment upon approval of the Director of ADOA. A.R.S. § 35-191(A).
4.9.1.3 Contract 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 in accordance with ADOA procedures if the claim is resolved administratively after one fiscal year. A.R.S. § 35-191(F).

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

4.9.2 Payment of Claims Subject to Administrative Adjustment.

4.9.2.1 Contract Claims from the Prior Fiscal Year. If a contract claim as described in Section 4.9.1.1 or 4.9.1.2 is presented to the Director of ADOA 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, after approving of the claim, will draw a warrant to pay the claim from the fund to which the lapsed appropriation reverted. A.R.S. § 35-191(B), (D).

4.9.2.2 Contract Claims More than One Fiscal Year Old. If a contract claim as described in Section 4.9.1.1 or 4.9.1.2 is presented to the Director of ADOA more than one but fewer 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 will present the claim to the legislature for an appropriation authorizing payment. A.R.S. § 35-191(C).

4.9.2.3 Contract Claims Not Exceeding $300. If a contract claim as described in Section 4.9.1.1 or 4.9.1.2 not exceeding $300 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 ADOA, may certify the claim for payment from an available current-year appropriation to the budget unit. A.R.S. § 35-191(D).

4.9.2.4 Contract Claims Arising from Administratively Determined Liability. A contract claim that has been administratively adjusted, see Section 4.9.1.3, is payable "from the appropriation for the year in which the liability is determined in accordance with the procedures established by the department of administration." A.R.S. § 35-191(F).

4.9.2.5 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.

4.9.3.1 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 A.R.S. §§ 12-820 to -826. See Chapter 13.

4.9.3.2 Contract Claims More Than Four Fiscal Years Old. A contract claim for payment for goods or services received four fiscal years or more before 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 pass a special appropriation act for the claimant's relief.

4.9.3.3 Claims Against Insufficient, Lapsed Appropriations. If the balance remaining in a lapsed appropriation applicable to a claim presented after the close of the fiscal year, see Section 4.9.2.1, or to a claim presented more than one but fewer than four years after the fiscal year in which the claim accrued, see Section 4.9.2.2, is not sufficient to pay the claim, the claim may not be paid through administrative adjustment, see A.R.S. § 35-191(B), (C). The claimant's only recourse respecting such a claim is to petition the legislature to enact a special appropriation for the claimant's relief.

4.10 Claims for Which No Appropriation Has Been Made. If the law recognizes a claim against the State, but the legislature has not appropriated money for its payment, the claimant may present the claim to ADOA, which shall audit and adjust the claim, give the claimant a certificate of the amount thereof, and report it to the next regular session of the legislature. A.R.S. § 35-189. In O'Neil v. Goldenetz, 53 Ariz. 51, 85 P.2d 705 (1938), the Supreme Court held that A.R.S. § 35-189 (then Section 35, Rev. Code 1928) was applicable to an obligation authorized by law, but for which no funds were appropriated and available for its payment. Id. at 59, 85 P.2d at 708. In Eide v. Frohmiller, 70 Ariz. 128, 216 P.2d 726 (1950), however, the supreme court held that a certificate of indebtedness would not issue when no appropriation had been made to pay for an obligation. The court noted that A.R.S. § 35-154 (then Section 10-923, A.C.A. 1939) had been enacted in 1943 and provided in substance that "any obligation incurred against the state by any person not authorized by previous appropriation and an allotment is null and void." 70 Ariz. at 135, 216 P.2d at 731. Hence, Eide casts doubt on the viability of A.R.S. § 35-189 because, under A.R.S. § 35-154, an obligation for which there is no appropriation available cannot be a claim for money recognized by the law.

4.11 Unauthorized Obligations and Illegal Expenditures of Public Monies.

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 incur an obligation or make an expenditure under any appropriation made by the legislature solely for the closed fiscal year. See Sections 4.7.4, 4.8, 4.9.1.1 to 4.9.1.3.
4.11.2 No Public Purpose. Every governmental expenditure must have a public purpose. See Section 4.6.5.

4.11.3 Lack of Appropriation. No person may obligate the State to expend public monies unless the legislature has authorized the obligation or expenditure by an appropriation. A.R.S. § w35-154. Moreover, an obligation incurred without authorization is null and void and incapable of ratification by any executive authority. Id. See Section 4.10.

4.11.4 Illegal Expenditures. An expenditure made without authorization is an illegal act resulting in joint and several liability to the state official or employee authorizing or approving the payment and the person receiving the payment. A.R.S. § 35-154. "Any state officer or employee who illegally withholds, expends or otherwise converts any state money to an unauthorized purpose [is individually liable] for the amount of such money, plus a penal sum of twenty per cent thereof." A.R.S. § 35-196. Either the Director of ADOA or the Attorney General may institute an action against the officer or employee violating this provision. Id. See also Sections 4.12, 4.13.

4.12 Recovery of State or Public Monies Illegally Paid. 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 . . . and the person in whose favor the claim or demand was made, shall be liable for [the illegal payment] plus twenty per cent of such amount and legal interest." A.R.S. § 35-211. The Attorney General or, upon the Attorney General's failure to act for sixty days after being requested to do so, a taxpayer of the State may institute an action to enjoin the illegal payment of public monies or, if the money has been paid, to recover the money plus twenty percent of the amount and interest and costs. A.R.S. §§ 35-212(A), -213. For this purpose, public money is defined 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." A.R.S. § 35-212(B).

4.13 Criminal Liability of Custodians of Public Monies. Section 35-301, A.R.S., provides:

[a] public officer or other person . . . charged with the receipt, safekeeping, transfer or disbursement of public money is guilty of a class 4 felony who:

1. Without authority of law, appropriates it, or any portion thereof, to his own use, or to the use of another.

2. Knowingly loans it, or any portion thereof.
3. Knowingly fails to keep it in his possession until disbursed or paid out [lawfully].

4. Without [statutory] authority . . . knowingly deposits it, or any portion thereof, 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 it.

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.

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 a duty is imposed by law to pay over the money.
CHAPTER 5
PROCUREMENT

Table of Contents

Section 5.1  Scope of this Chapter
Section 5.2  General Provisions and Applicability of the Procurement Code

5.2.1  Scope of the Procurement Code
5.2.2  Department of Administration’s Responsibility for Procurement and Disposal

5.2.2.1 State Procurement Administrator
5.2.2.2 Delegation of Department of Administration’s Authority to State Governmental Units

5.2.2.3 Agency Chief Procurement Officer
5.2.3  State Governmental Unit’s Responsibility for the Procurement of Services of Clergy, Certified Public Accountants, Lawyers, Physicians, and Dentists

5.2.3.1 State Governmental Unit’s Procurement of Legal Services
5.2.3.2 State Governmental Unit’s Procurement of Services of Certified Public Accountants
5.2.3.3 State Governmental Unit’s Procurement of Information Technology Purchases

5.2.4  Procurement by State Governmental Units Exempted from the Procurement Code and Separately Authorized to Purchase
5.2.5  Specific Procurements Exempted from the Procurement Code

5.2.5.1 State Lottery Commission
5.2.5.2 Arizona Health Care Cost Containment System Provider Contracts

Revised 2011
5.2.5.3 Arizona Industries for the Blind’s Procurement of Finished Goods and Raw Materials
5.2.5.4 Arizona Correctional Industries’ Procurement of Raw Materials
5.2.5.5 Construction of Transportation and Highway Facilities
5.2.5.6 Arizona Highways Magazine
5.2.5.7 Publication and Sale of Administrative Code
5.2.5.8 Professional Witnesses in Judicial Proceedings
5.2.5.9 Adoption of Rules, Procedures or Policies by Head of State Governmental Unit
5.2.5.10 Settlement of Litigation
5.2.5.11 Department of Economic Security Provider Contracts
5.2.5.12 Department of Health Services Mental Health, Drug and Alcohol, and Domestic Violence Services Subcontracts
5.2.5.13 Physician Services at Arizona State Hospital
5.2.5.14 Public Safety Personnel Retirement System
5.2.5.15 Department of Agriculture Cotton and Cotton Stubble Plow-Up Contracts
5.2.5.16 State Parks Board Purchases of Certain Supplies and Items for Resale at Tonto Natural Bridge State Park
5.2.5.17 Arizona State Parks Board
5.2.5.18 State School for the Deaf and Blind
5.2.5.19 Morale, Welfare and Recreational Fund
5.2.5.20 State Department of Corrections; Contracts with Local Medical Providers
5.2.5.21 Department of Environmental Quality
5.2.5.22 Motor Vehicle Division; Third Party Authorizations

Revised 2011
5.2.5.23 State Forester
5.2.5.24 Cotton Research and Protection Council
5.2.5.25 Agricultural Protection Fund

Section 5.3 Procurement Code Procedures

5.3.1 Source Selection Method; Materials and Services under Existing Arizona State Contracts

5.3.2 Procurements Not Exceeding $50,000 in the Aggregate; Small Business Set Aside

5.3.2.1 Simplified Construction Procurement Program

5.3.2.2 Purchases of $5,000 and Less

5.3.3 Sole Source Procurement

5.3.4 Emergency Procurement

5.3.5 Competition Impracticable Procurements

5.3.6 Unsolicited Proposals

5.3.7 Demonstration Projects

5.3.8 General Procurement of Materials and Services

5.3.8.1 Competitive Sealed Bidding

5.3.8.1.1 Contents of the Invitation for Bids (IFB)

5.3.8.1.2 Bid Evaluation and Award

5.3.8.1.3 Multistep Sealed Bidding

5.3.8.2 Competitive Sealed Proposals

5.3.9 Procurement of Professional Services of Clergy, Physicians, Dentists, Legal Counsel, and Certified Public Accountants

Revised 2011
5.3.10 Procurement of Professional Services of or for Architects, Construction-Managers-at Risk, Design-Build Construction, Job-Order-Contracting Construction, Engineers, Assayers, Geologists, Landscape Architects, and Land Surveyors

5.3.10.1 Request for Qualifications

5.3.10.2 Evaluation and Negotiation

5.3.10.3 Alternative to A.R.S. § 41-2578(E)

5.3.11 Procurement of Information Systems and Telecommunication Systems

5.3.12 Procurement of Earth-Moving, Material Handling, Road Maintenance and Construction Equipment

5.3.13 Public-Private Partnership Contracts

Section 5.4 General Procurement Requirements

5.4.1 Responsible Bidder

5.4.2 Prequalification of Contractors

5.4.3 Requests for Information

5.4.4 Conformity of Invitation for Bids (IFB) or Request for Proposals (RFP) to Specifications

5.4.5 Bid and Contract Security

5.4.5.1 Construction and Construction Services Contracts

5.4.6 Cost or Pricing Data

5.4.7 Written Contracts

5.4.8 Indemnity Agreements in Construction and Architect-Engineer Contracts

5.4.9 Modification, Correction, and Withdrawal of Bids

5.4.10 Solicitation Amendments

Revised 2011
5.4.11 Cancellation of Solicitation
5.4.12 Multi-term Contracts
5.4.13 Right to Inspect Plant and Audit Records
5.4.14 Conflict of Interest
5.4.15 Personal Use Prohibition
5.4.16 Prohibition Against Discrimination
5.4.17 On-line Bidding

Section 5.5 Materials Management
5.5.1 Disposition of Surplus Materials

Section 5.6 Legal and Contractual Remedies
5.6.1 Exclusive Remedy
5.6.2 Protested Solicitations and Awards
5.6.2.1 Procurement Officer
5.6.2.2 Appeals to the Director
5.6.3 Contract Claims and Controversies Between a Contractor and the State
5.6.3.1 Claims Initiated by the Contractor
5.6.3.2 Claims Initiated by the State
5.6.4 Debarring or Suspending a Person from Participating in State Procurements
5.6.5 Hearings Under the Procurement Rules
5.6.6 Rehearing
5.6.7 Judicial Review of Administrative Decisions
Section 5.7  Intergovernmental Procurement

5.7.1  Cooperative Purchasing

5.7.1.1  Compliance with Procurement Code

5.7.1.2  Controversies

5.7.2  Purchasing from the Arizona Industries for the Blind and from Arizona Correctional Industries

5.7.3  General Services Administration Contracts

Section 5.8  Violation of the Procurement Code

5.8.1  Enforcement of the Procurement Code

5.8.2  Civil Penalty

5.8.3  Criminal Penalty

5.8.4  Reporting of Anticompetitive Practices

Section 5.9  Procurement and the Antitrust Laws

5.9.1  The Procurement Officer’s Function

5.9.2  Objectives of the Antitrust Laws

5.9.3  Federal Antitrust Laws

5.9.3.1  The Sherman Antitrust Act

5.9.3.2  The Clayton Antitrust Act

5.9.3.3  The Federal Trade Commission Act

5.9.4  State Antitrust Laws

5.9.4.1  Uniform State Antitrust Act

5.9.4.2  Bid-Rigging Statutes

5.9.5  Conduct Illegal Under the Antitrust Laws

Revised 2011
5.9.5.1 Price Fixing
5.9.5.2 Bid Rigging
5.9.5.3 Division of Markets - Territorial Market Allocation
5.9.5.4 Tying Arrangements
5.9.5.5 Group Boycotts - Horizontal Refusals to Deal
5.9.5.6 Monopolization
5.9.5.7 Other Unlawful Acts
5.9.6 Exemptions
5.9.6.1 State Action Exceptions and Immunities
5.9.7 Enforcement of Antitrust Laws
5.9.8 Detecting Antitrust Violations in Bidding
5.9.8.1 Identical Bids
5.9.8.2 Simultaneous Price Increases and Price Maintenance
5.9.8.3 Bid Rotation
5.9.8.4 Customer Allocation
5.9.8.5 Territorial Allocation
5.9.8.6 Other Suspicious Bidding Practices
5.9.9 Application of the Antitrust Laws to State Employees Engaged in Purchasing
5.9.10 Antitrust Attorney’s Fees
CHAPTER 5
PROCUREMENT

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 to acquire materials, services, and construction and the law applicable to the disposal of state materials. This chapter also reviews exemptions to the Procurement Code. 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 discuss 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 -2673, and the Department of Administration Rules, A.A.C. R2-7-101 to -1301, implementing the Code.

5.2 General Provisions and Applicability of the Procurement Code.

5.2.1 Scope of the Procurement Code. Absent a specific statutory exception, the Procurement Code applies to any expenditure of public monies by any state governmental unit under any contract for the procurement of materials, services, construction, or construction services. A.R.S. § 41-2501. In the context of the Procurement Code, public officers or employees should consider any money that is in their custody in their official capacity to be public money. The Procurement Code itself provides definitions of its key terms.

The term “state governmental unit” is defined 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.” A.R.S. § 41-2503(35).

The term “contract” is defined 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.” A.R.S. § 41-2503(7).

The term “procurement” is defined as “buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services.” A.R.S. § 41-2503(31)(a). Procurement also includes “all functions that pertain to obtaining any material, services, construction or construction services, including description of

---

1 See Chapter 4 for discussion of public monies.
requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.” A.R.S. § 41-2503(31)(b).

The term “materials” is defined as “all property, including equipment, supplies, printing, insurance and leases of property,” but “[d]oes not include land, a permanent interest in land or real property or leasing space.” A.R.S. § 41-2503(26)(a) and (b).

The term “services” is defined as “the furnishing of labor, time, or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance.” Services “[d]oes not include employment agreements or collective bargaining agreements.” A.R.S. § 41-2503(34)(a) and (b).

“Construction” is defined 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 facilities, structures, buildings or real property.” Further, construction does not include “the investigation characterization, restoration or remediation due to an environmental issue of existing facilities, structures, building or real property.” A.R.S. § 41-2503(4)(a) and (b).

“Construction Services” means either of the following for construction-manager-at-risk, design-build, and job-order-contracting project delivery methods:

(a) Construction, excluding services, through the construction-manager-at-risk or job-order-contracting project delivery methods.

(b) A combination of construction and, as elected by the purchasing agency, one or more related services, such as finance services, maintenance services, operations services, design services and preconstruction services, as those services are authorized in the definitions of construction-manager-at-risk, design-build, or job-order-contracting in this section. A.R.S. § 41-2503(6).

5.2.2 Department of Administration’s (DOA’s) Responsibility For Procurement and Disposal. Except as specifically provided otherwise by statute, the Legislature has delegated to the Director of DOA the sole authority and responsibility for procurement and management of all materials, services and construction, and disposal of materials. A.R.S. § 41-2511. Pursuant to this directive, the Director 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. A.A.C. R2-7-101 to -1009, R2-15-301 to -310.

5.2.2.1 State Procurement Administrator. The Director shall hire a state procurement administrator who shall administer the procurement of materials, services and
construction needed by the state. A.A.C. R2-7-201(A) and (B). The state procurement administrator shall delegate procurement authority under R2-7-202 and shall maintain a record of each contract awarded under A.R.S. §§ 41-2536, 41-2537 that exceeds the amount prescribed in A.R.S. § 41-2535(A). A.A.C. R-2-201(C). The state procurement administrator shall resolve procurement disputes between a purchasing agency and its agency chief procurement officer. A.A.C. R2-7-207.

5.2.2.2 Delegation of Department of Administration's (DOA's) Authority to State Governmental Units. The Director of DOA is authorized to delegate procurement authority to any state governmental unit. A.R.S. § 41-2512. The Director has done so pursuant to A.A.C. R2-7-202. The delegations have been both general and limited depending upon the capabilities and past experience of the state governmental unit and the impact of the delegation on procurement efficiency and effectiveness. Delegations must be in writing. Id. § (B). Delegated procurement authority must be exercised according to the terms of the delegation, the procurement rules, and the Procurement Code. Id. § (D).

5.2.2.3 Agency Chief Procurement Officer. An agency chief procurement officer may further delegate procurement authority within the purchasing agency. A.A.C. R2-7-203. A procurement officer shall perform all procurement duties in accordance with the AZ Proc-Code and within delegated authority. A.A.C. R2-7-206.

5.2.3 State Governmental Unit's Responsibility for the Procurement of Services of Clergy, Certified Public Accountants, Lawyers, Physicians, and Dentists. 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.R.S. § 41-2513(A). A state governmental unit's procurement of such services must comply with the Procurement Code and the rules of the Director of DOA. Id.

5.2.3.1 State Governmental Unit's Procurement of Legal Services. With few exceptions, state governmental units are prohibited from procuring legal services from anyone other than the Attorney General. A.R.S. § 41-192(E). See Sections 1.3.3 and 1.9.5 to 1.9.5.4. When a state governmental unit is authorized to procure legal services outside of the Attorney General's Office, see, e.g., A.R.S. § 41-192(F), (G), the Legislature has provided that the state governmental unit may do so only in compliance with the Procurement Code, A.R.S. § 41-2513(A), and with the approval of the Attorney General. Id. § (B).

5.2.3.2 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 only upon approval of the Auditor General. A.R.S. § 41-2513(C). The Auditor General is required to ensure that contract audits are conducted in accordance with generally accepted
governmental auditing standards. "An audit shall not be accepted until it has been approved by the auditor general." Id.

5.2.3.3 State Governmental Unit’s Procurement of Information Technology Purchases. The government information technology agency established by A.R.S. § 41-3502 may approve all information technology purchases exceeding twenty five thousand dollars for a budget unit. A.R.S. § 41-2513(D).

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 and the legislative and judicial branches of state government from the Procurement Code, A.R.S. § 41-2501(D); however, the Legislature has directed the Arizona Board of Regents and the judicial branch to adopt procurement rules substantially equivalent to the Procurement Code prescribing procurement policies and procedures for themselves and the institutions under their jurisdiction. Id. § (E). A state governmental unit that is exempt from the Procurement Code and is authorized to engage in procurement without complying with any other procurement procedure nevertheless has a fiduciary obligation to the citizens and taxpayers of the State to conduct procurements in utmost good faith and in the best interests of the State. See Brown v. City of Phoenix, 77 Ariz. 368, 375, 272 P.2d 358 (1954); Osborn v. Mitten, 39 Ariz. 372, 376, 6 P.2d 902, 904 (1932).

In the opinion of the Attorney General, competitive bidding should be employed in most procurements; the Attorney General's experience is that lack of competition in procurement generates abuse, results in favoritism, and usually results in higher costs. Ariz. Att'y Gen. Op. 75-11.

5.2.5 Specific Procurements Exempted from the Procurement Code. The Legislature has exempted from the Procurement Code certain specific procurements enumerated in A.R.S. § 41-2501 and described in Sections 5.2.5.1 to 5.2.5. With respect to those exempted procurements, "[t]he head of any state governmental unit . . . has the same authority to adopt rules, procedures or policies as is delegated to the [D]irector [of the Department of Administration in the Procurement Code]." A.R.S. § 41-2501(N). See Section 5.2.4 respecting a state governmental unit's fiduciary duty and the Attorney General's opinion regarding procurements that are exempt from statutory procedures.

5.2.5.1 State Lottery Commission. The Legislature has exempted from the Procurement Code procurements relating to the design and operation of the lottery and the purchase of lottery equipment, tickets, and related material. It has, however, directed the Executive Director of the Lottery Commission to promulgate rules respecting procurement that are substantially equivalent to the Procurement Code. A.R.S. § 41-2501(F).
5.2.5.2 Arizona Health Care Cost Containment System Provider Contracts. The Legislature has exempted from the Procurement Code the procurement of Arizona Health Care Cost Containment System provider contracts authorized in A.R.S. § 36-2904(A), and Arizona Long-Term Care System contracts for goods and services (including program contractors authorized in A.R.S. §§ 36-2931 et seq., and Qualified Medicare Beneficiary program contractors authorized in A.R.S. §§ 36-2971 et seq.). A.R.S. § 41-2501(G)).

5.2.5.3 Arizona Industries for the Blind's Procurement of Finished Goods and Raw Materials. The Legislature has exempted from the Procurement Code the Arizona Industries for the Blind's procurement of finished goods from members of National Industries for the Blind and the purchases of raw materials to be used in manufacturing products for sale under programs operated or supported by the Department of Economic Security for training and employing blind persons. A.R.S. § 41-2501(H).

5.2.5.4 Arizona Correctional Industries' Procurement of Raw Materials. The Legislature has exempted from the Procurement Code the Arizona Correctional Industries' procurement of raw materials, components and supplies to be used in manufacturing products for sale to the State, a political subdivision, or the public. A.R.S. § 41-2501(I).

5.2.5.5 Construction of Transportation and Highway Facilities. The Legislature has exempted from 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 and other related services. A.R.S. § 41-2501(J).

5.2.5.6 Arizona Highways Magazine. The Legislature has exempted from the Procurement Code contracts for the production, promotion, distribution, and sale of Arizona Highways Magazine and related products and for sole source creative works. A.R.S. § 41-2501(K).

5.2.5.7 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 and sale of the Administrative Code. A.R.S. § 41-2501(L).

5.2.5.8 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 or to contract for special investigative services for law enforcement purposes. A.R.S. § 41-2501(M).

5.2.5.9 Adoption of Rules, Procedures or Policies by Head of a State Governmental Unit. The head of a state governmental unit may adopt rules, procedures, or policies in relation to any exempted contract. A.R.S. § 41-2501(N).
5.2.5.10 **Settlement of Litigation.** The Legislature has exempted from the
Procurement Code agreements negotiated by legal counsel representing the State to settle
litigation or threatened litigation. A.R.S. § 41-2501(O).

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 day care services or
family foster care services. A.R.S. § 41-2501(P). The Procurement Code also does not
apply to Department of Economic Security contracts with area agencies on aging created
pursuant to the Older American Acts of 1965, Pub. L. 89-73, 79 Stat. 218 (codified in
scattered sections of 42 U.S.C.), or to contracts for Arizona Long-Term Care System
services. Id.

5.2.5.12 **Department of Health Services Mental Health, Drug and Alcohol, and
Domestic Violence Services Subcontracts.** The Department of Health Services may not
require that persons with whom it contracts follow the Procurement Code when
subcontracting for the provision of mental health services pursuant to A.R.S. § 36-189(B),
services for the seriously mentally ill pursuant to A.R.S. §§ 36-550 to -550.08, drug and
alcohol services pursuant to A.R.S. § 36-141, and domestic violence services pursuant to
A.R.S. §§ 36-3001 to -3009. A.R.S. § 41-2501(Q).

5.2.5.13 **Physician Services at the Arizona State Hospital.** The procurement of
contracts for physicians' services at the Arizona State Hospital is exempt from the

5.2.5.14 **Public Safety Personnel Retirement System.** Contracts for goods and
services approved by the board of trustees of the public safety personnel retirement
system are exempt from the Procurement Code. A.R.S. § 38-848(M); A.R.S. § 41-2501(S).

5.2.5.15 **Department of Agriculture Cotton and Cotton Stubble Plow-Up
Contracts.** The Department of Agriculture is exempt from the requirements of the
Procurement Code with respect to contracts for private labor and equipment to plow up
cotton and cotton stubble, pursuant to rules adopted as authorized in A.R.S. §§ 3-201 to

5.2.5.16 **State Parks Board Purchases of Certain Supplies and Items for
Resale at Tonto Natural Bridge State Park.** The State Parks Board is exempt from the
requirements of the Procurement Code with respect to purchases of guest supplies and
various items for resale at facilities located in the Tonto Natural Bridge State Park. A.R.S.
§ 41-2501(U).

5.2.5.17 **Arizona State Parks Board.** The State Parks Board is exempt from the
Procurement Code for the purchase, production, promotion, distribution, and sale of
5.2.5.18 State School for the Deaf and Blind. The State Schools for the Deaf and Blind are exempt from the provisions of the Procurement Code if products are purchased through a cooperative which operates in accordance with state law, and the products meet certain legal requirements. A.R.S. § 41-2501(W).

5.2.5.19 Morale, Welfare and Recreational Fund. The expenditures of monies in the morale, welfare, and recreational fund established by A.R.S. § 26-153 are exempt from the Procurement Code provisions. A.R.S. § 41-2501(X).

5.2.5.20 State Department of Corrections; Contracts With Local Medical Providers. Notwithstanding A.R.S. § 41-2534, the director of the Department of Corrections may contract with local medical providers in counties with a population of less than four hundred thousand persons to acquire hospital and medical services for inmates incarcerated in those counties and to ensure medical services for inmates in all counties by contracting with the closest medical facility that offers emergency treatment and stabilization. A.R.S. § 41-2501(Y).

5.2.5.21 Department of Environmental Quality. The Department of Environmental Quality is exempt from the Procurement Code for contracting for procurements relating to the water quality assurance revolving fund program. The Department may contract for remedial actions with a single selection process. The exclusive remedy for disputes or claims relating to contracting pursuant to this subsection shall be as prescribed by A.R.S. § 41-2611 et seq. A.R.S. § 41-2501(Z).

5.2.5.22 Motor Vehicle Division; Third Party Authorizations. The Motor Vehicle Division of the Department of Transportation is exempt from the Procurement Code for third party authorizations if certain statutory conditions exist. Public monies cannot be paid to a third party and exclusivity cannot be granted to a third party. The director of the Department of Transportation shall comply with the requirements in Title 28, Ch. 13, when selecting a third party. A.R.S. § 41-2501(AA). Third party authorizations pursuant to title 28, Chapter 13 are not exempted from any other applicable law. A.R.S. § 41-2501(BB).

5.2.5.23 State Forester. The state forester is exempt from the Procurement Code for purchases and contracts relating to wild land fire suppression and propositioning equipment resources and other activities related combating wild land fires and other unplanned risk activities. A.R.S. § 41-2501(CC).

5.2.5.24 Cotton Research and Protection Council. The cotton research and protection council is exempt from the Procurement Code for procurements relating to its aflatoxin control program and for contracts for research programs related to cotton production of protection. A.R.S. § 41-2501/DD.)
5.2.5.25 Agricultural Protection Fund. Expenditures of monies in the agricultural protection fund established by A.R.S. § 3-3304 are exempt from the Procurement Code. A.R.S. § 41-2501(EE).

5.3 Procurement Code Procedures. This section reviews several procedures and requirements applicable to Arizona state contracts, procurements not exceeding $50,000, sole source procurements, emergency procurements, competition impracticable procurements, unsolicited proposals, demonstration projects, competitive sealed bids, competitive sealed proposals, and procurement of certain professional services, information and telecommunications systems, and specified construction materials. Unless otherwise authorized by law, all state contracts shall be awarded by competitive sealed bidding as provided in A.R.S. § 41-2533, except as provided by other statutes set forth in A.R.S. § 41-2532.

5.3.1 Source Selection Method; Materials and Services under Existing Arizona State Contracts. State governmental units must use existing state contracts to purchase the materials and services that are covered by such contracts. A.A.C. R2-7-A301(A). 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 first obtaining written approval from the State Procurement Administrator. A.A.C. R2-7-A301(B). A governmental unit should consult the State Procurement Office if questions arise. The agency chief procurement officer shall determine the applicable source selection method. Id. § (C). A contract shall not be awarded and an obligation shall not be incurred on behalf of the state if sufficient funds are not available. Id. § (D).

5.3.2 Procurements Not Exceeding $50,000 in the Aggregate; Small Business Set Aside. The Director of DOA has authority to promulgate rules governing a procurement that does not exceed an aggregate dollar amount of $50,000. A.R.S. § 41-2535(A). Those rules require the agency chief procurement officer to issue a request for quotation, following the procedures set forth in A.A.C. R2-7-D302 through –D304, in order to satisfy the statutory requirement that purchases not exceeding $50,000 be made with “such competition as is practicable under the circumstances.” Id.

The Administrative Code provides specific procedures for handling purchases estimated to cost between $5,000 and $50,000. See A.A.C. R2-7-D302 through –D304. These procedures do not need to be followed if the purchase can be made from an existing state or agency contract or from a set-aside organization as defined in A.A.C. Chapter 2, Title 7, Article 10 (intergovernmental procurement), if the purchase is not expected to exceed $5,000 or is made as a sole-source procurement under A.R.S. § 41-2536, or if the agency chief procurement officer makes a written determination that competition is not practicable under the circumstances. See A.A.C. R2-7-D301.

The purchaser should make a good faith estimate of a procurement's aggregate cost in order to determine whether the procurement is governed by the DOA rules on purchases not exceeding $50,000. Procurements shall not be artificially divided or
fragmented to circumvent the procedures required for purchases exceeding $50,000. See A.R.S. § 41-2535(C). A procurement that does not exceed an aggregate amount of less than $50,000 shall be restricted, where practicable, to small businesses as defined in the rules promulgated by the Director of DOA. See A.R.S. § 41-2535(B); A.A.C. R2-7-D302(B), –D303, and –D304(B). The request for quotation must include those items identified in A.A.C. R2-7-D302, and must be issued by posting on the state procurement office’s centralized electronic system or distributed to at least three small businesses in accordance with A.A.C. R2-7-D303.

5.3.2.1 Simplified Construction Procurement Program. Section 41-2535(D), A.R.S., provides that “[a] procurement involving construction not exceeding [$100,000] may be made pursuant to the rules adopted by the [D]irector.” The minimum rule requirements are in the statute.

5.3.2.2 Purchases of $5,000 and Less. For purchases of $5,000 or less, the agency chief procurement officer may, but is not required to, use a request for quotation. The agency chief procurement officer shall use reasonable judgment in awarding contracts for $5,000 or less and in determining that such contracts are advantageous to the state. A.A.C. R2-7-D305.

5.3.3 Sole Source Procurement. A contract for a material, service, or construction item may be awarded without competition if the Director of DOA determines in writing that there is only one source for the required material, service or construction item; however, sole source procurements shall be avoided except when no reasonable alternative sources for the material, service, or construction item exist. A.R.S. § 41-2536. The Director of DOA may require the submission of cost or pricing data in connection with a sole source procurement award. Id.

The agency chief procurement officer must provide written evidence to support a sole source determination, including documentation that the price is fair and reasonable per A.A.C. R2-7-702 and a description of the efforts made to find other sources. A.A.C. R2-7-E301. A written determination of the basis for the sole source procurement must be included in the contract file. A.R.S. § 41-2536.

5.3.4 Emergency Procurement. The Director of DOA may make, or authorize others to make, emergency procurements “if there exists a threat to public health, welfare, or safety or if a situation exists which makes compliance with section 41-2533, 41-2534, 41-2578, 41-2579, or 41-2581 impracticable, unnecessary or contrary to the public interest as defined in rules adopted by the director, except that such emergency procurements shall be made with such competition as is practicable under the circumstances.” A.R.S. § 41-2537. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. Id.

An “emergency” means “any condition creating an immediate and serious need for materials, services, or construction in which the state’s best interests are not met through
the use of other source-selection methods. The condition must seriously threaten the functioning of state government, the preservation or protection of property, or the health or safety of a person.” A.A.C. R2-7-E302(A).

The rules set forth in A.A.C. R2-7-E302 apply only to emergency procurements for purchases above the $50,000 threshold. A.A.C. R2-7-E302(B). For such emergency purchases, the agency chief procurement officer must obtain the approval of the Director of DOA before engaging in an emergency procurement unless the emergency requires an immediate response. A.A.C. R2-7-E302(E). The agency must limit the procurement to such actions necessary to address the emergency, and must employ maximum competition, given the circumstances. A.A.C. R2-7-E302(F) and –E302(G).

5.3.5 Competition Impracticable Procurements. “Competition impracticable” means a procurement requirement exists which is not an emergency under A.A.C. R2-7-E302, but it is one where compliance with A.R.S. §§ 41-2533, 41-2534, 41-2538 or 41-2578 would be impracticable, unnecessary, or contrary to the public interest. See A.A.C. R2-7-E303(A). The agency chief procurement officer must obtain the approval of the State Procurement Administrator before proceeding, and must provide, among other things listed in the rule, an explanation of the competition impracticable need and the unusual or unique situation that makes compliance with A.R.S. §§ 41-2533, 41-2534, 41-2538, or 41-2578 impracticable, unnecessary, or contrary to the public interest. A.A.C. R2-7-E303(C)(1).

5.3.6 Unsolicited Proposals. A contract may be awarded based on an unsolicited proposal (i.e., a proposal submitted at the proposer’s initiative and not in response to a solicitation) only if the Director of DOA determines in writing that the conditions for a sole source or an emergency procurement exist and that the unsolicited proposal satisfies the statutory requirements. A.R.S. § 41-2557; A.A.C. R2-7-G303. An agency chief procurement officer must obtain written approval from the State Procurement Administrator prior to proceeding with an unsolicited proposal. A.A.C. R2-7-G303(E)(1).

5.3.7 Demonstration Projects. If the Director of DOA determines in writing that a project is innovative and unique, a demonstration project may be undertaken. A.R.S. § 41-2556(A). A demonstration project may not continue longer than two years. Id.; A.A.C. R2-7-G302(F). The state is not required to pay for a demonstration project and may only do so upon written determination from the Director of DOA that doing so is in the best interests of the state. Id.; A.A.C. R2-7-G302(C). An agency chief procurement officer must obtain written approval from the state procurement administrator prior to proceeding with a demonstration project. A.A.C. R2-7-G302(B).

5.3.8 General Procurement of Materials 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, -2533. See Sections 5.3.8.1 through 5.3.8.1.3. See A.A.C. R2-7-A301 for a discussion of the determination factors of a source selection method for a procurement. The Director of DOA may specify in writing that "competitive sealed bidding is either not practicable or not advantageous to this state," in
which case competitive sealed proposals may be solicited. A.R.S. § 41-2534(A); see Section 5.3.8.2. Generally, competitive sealed proposals are used to obtain commodities and outside professional services not governed by A.R.S. § 41-2538. See Section 5.3.9 for a discussion of A.R.S. § 41-2538. The competitive sealed proposal method cannot be used for procurement of construction or construction services, which are governed by A.R.S. §§ 41-2537, -2578 or -2579 and are discussed in Section 5.3.10. A.R.S. § 41-2534(A).

5.3.8.1 Competitive Sealed Bidding. Section 41-2533, A.R.S., and A.A.C. R2-7-B301 through –B316 describe the procedures to be followed in competitive sealed bidding. Either the State Procurement Administrator or an agency chief procurement officer, if authorized, issues an Invitation for Bids (IFB) describing what is to be purchased, all contractual terms to be entered into by the successful bidder, and the conditions of the procurement. A.R.S. § 41-2533(B). The public must receive notice of the IFB at least fourteen days before the bid is opened, A.A.C. R2-7-B301(A), and such notice may include publication one or more times in a newspaper of general circulation. A.R.S. § 41-2533(C). If the IFB is for procurement of services other than those described in A.R.S. §§ 41-2513 and 41-2578, the notice must be published in one or more newspapers within the state. Id. The notice may also be posted at a designated site on a worldwide public network of interconnected computers (i.e., the world-wide-web). The purchasing authority is also required to mail or otherwise furnish written notice of the IFB to all "prospective suppliers that have registered with the state procurement office for the specific material, service, or construction solicited." A.A.C. R2-7-B301(B)(2). The bids must be opened in public at the time and place designated in the IFB, and the name of the bidders and amounts of the bids shall be recorded. A.R.S. § 41-2533(D); A.A.C. R2-7-B306. That record must be open to public inspection, but no bid may be inspected by the public or by other bidders until an award has been made. Id.

5.3.8.1.1 Contents of the Invitation for Bids (IFB). An IFB must contain the information listed in A.A.C. R2-7-B301(C), which includes instructions, evaluation criteria, specifications and applicable contract terms and conditions. A.R.S. § 41-2533(B); A.A.C. R2-7-B301(C).

An IFB must include specifications, i.e., descriptions of the “physical or functional characteristics, or of the nature of a material, service or construction item." A "[s]pecification may include a description of any requirement for inspecting, testing or preparing a material, service or construction item for delivery." A.R.S. § 41-2561. 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, -2566. Because of this philosophy, proprietary specifications -- those specifications that identify a product by brand name or that are so restrictive as to exclude all but a brand name product -- are prohibited. See A.A.C. R2-7-401 to -403. As specifically stated in A.A.C. R2-7-B301(C)(2)(b):
If a brand name or equal specification is used, instructions that 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 the brands designated qualify for consideration.


### 5.3.8.1.2 Bid Evaluation and Award

Under the competitive sealed bidding procedures, a state governmental unit must award a contract to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and evaluation criteria set forth in the IFB. A.R.S. § 41-2533(G). A bidder who takes exception to a mandatory specification in an IFB is not a responsive bidder and the procuring governmental unit must reject that bidder's nonresponsive bid. A.A.C. R2-7-B312(B). The chief procurement officer shall evaluate bids "to determine which offer provides the lowest cost to the state in accordance with any objectively measurable factors set forth in the solicitation." A.A.C. R2-7-B312(A). Only those evaluation criteria that are set forth in the IFB shall be applied in evaluating bids. A.R.S. § 41-2533(E). A record showing the basis for determining the successful bidder shall be retained in the procurement file. A.A.C. R2-7-B314(B).

### 5.3.8.1.3 Multistep Sealed Bidding

Multistep sealed bidding may be used when specifications are inadequate to ensure full competition and technical evaluations are necessary to ensure mutual understanding of the state’s procurement needs. A.R.S. § 41-2533(H); A.A.C. R2-7-B316(B). Multistep sealed bidding may not be used for construction contracts. A.R.S. § 41-2533(H). An agency chief procurement officer may use multistep sealed bidding only after written approval from the State Procurement Administrator. Id. Multistep sealed bidding requires two phases: first, an agency chief procurement officer issues an invitation to submit unpriced technical offers in accordance with the procedures set forth in A.A.C. R2-7-B316(C). Id. Second, the agency chief procurement officer issues an IFB, in accordance with the procedures set forth in A.A.C. R2-7-B301 to –B315, to those offerors whose offers were selected in phase one. Id.

### 5.3.8.2 Competitive Sealed Proposals

Competitive sealed proposals may be solicited if the Director of DOA determines in writing that "competitive sealed bidding is either not practicable or not advantageous to this state." A.R.S. § 41-2534(A); A.A.C. R2-7-C301(A). Competitive sealed proposals may not be used for construction, construction services, or specified professional services. A.R.S. § 41-2534(A). At least fourteen days before a Request for Proposals (RFP) is issued, adequate public notice must be given in the same manner as that provided for competitive sealed bidding, as described in Section 5.3.8.1. A.R.S. § 41-2534(C); A.A.C. R2-7-C301(C). An RFP must include the items listed in A.A.C. R2-7-C301(E), and must state the relative importance of price and
other evaluation factors. A.R.S. § 41-2534(E); A.A.C. R2-7-C301(E). Proposals must be opened in public; however, their contents, including price, must remain confidential until an award is made. A.R.S. § 41-2534(D); A.A.C. R2-7-C306.

Discussions may be held with those offerors deemed reasonably susceptible to being selected for award, but all offerors must be accorded fair treatment with respect to an opportunity for discussions. A.R.S. § 41-2534(F); A.A.C. R2-7-C314. Such discussions may be held “for the purpose of clarification to ensure full understanding of the solicitation requirements and to permit revision of offers.” A.R.S. § 41-2534(F). During such discussions, there shall be no disclosure of information from competing offerors. Id.; A.A.C. R2-7-C314(A). After discussions are held, all offerors shall be invited to submit final revised proposals. Id.; A.A.C. R2-7-C315.

The award shall be made to the responsive and responsible offeror whose proposal is determined to be the "most advantageous to this state" based upon the RFP evaluation factors. A.R.S. § 41-2534(G); A.A.C. R2-7-C317. Proposals shall be evaluated based solely on the evaluation criteria contained in the RFP, and the agency chief procurement officer cannot modify those evaluation criteria or their relative order of importance. A.A.C. R2-7-C316(A).

5.3.9 Procurement of Professional Services of Clergy, Physicians, Dentists, Legal Counsel, and Certified Public Accountants. 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 A.R.S. § 41-2538. See also A.A.C. R2-7-F302. That section requires that the procurement of such services follow statutory standards unless the services do not exceed $50,000. (A.R.S. § 41-2535; see Section 5.3.2); are sole source procurements (A.R.S. § 41-2536; see Section 5.3.3); or are emergency procurements (A.R.S. § 41-2537; see Section 5.3.4). The procuring state governmental unit must give notice of its need for such services through an RFP that describes the needed services and lists the type of information and data required of each offeror. A.R.S. § 41-2538(C); A.A.C. R2-7-F302(B). The RFP also must contain the evaluation criteria that the procuring unit will apply when it makes an award. A.R.S. § 41-2538(E). The procuring unit may conduct discussions with offerors to determine their qualifications for further consideration, but cannot disclose information derived from competing proposals. Id. § (D); A.A.C. R2-7-F308. The award must be made to the offeror determined in writing to be the best qualified based on the evaluation factors contained in the RFP. Id. § (E); A.A.C. R2-7-F309. There must also be a written determination that the compensation is fair and reasonable. Id. An award may be made without requiring priced proposals; however, if price is included in the proposals submitted, an award may not be made solely on the basis of price. Id.; see A.A.C. R2-7-F309(A).

5.3.10 Procurement of Professional Services of or for Architects, Construction-Managers-at Risk, Design-Build Construction, Job-Order-Contracting Construction, Engineers, Assayers, Geologists, Landscape Architects, and Land Surveyors. Except as provided in A.R.S. § 41-2535 for procurements not to exceed $50,000, A.R.S.
§ 41-2536 for sole source procurements, and A.R.S. § 41-2537 for emergency procurements, procurements for the professional services listed in this paragraph must be conducted pursuant to A.R.S. §§ 41-2578 and 41-2579 and A.A.C. R2-7-501 to -511. A purchasing agency may procure these services using any of the following project delivery methods: design-bid-build; construction-manager-at-risk; design-build; or job-order-contracting. A.R.S. § 41-2579. For all four project delivery methods, the design services must be procured under A.R.S. § 41-2578. Construction services for the design-bid-build project delivery method may be procured under A.R.S. § 41-2533. Construction services for construction manager at risk, design-build, or job-order-contracting project delivery methods must be procured using A.R.S. § 41-2578.

5.3.10.1 Request for Qualifications. A.R.S. § 41-2578 details the specific requirements for a Request for Qualifications (RFQ) for such services, and the procurement officer should carefully examine the statutory requirements. Adequate public notice of the solicitation must be provided in the same manner as that set forth in A.R.S. § 41-2533. A.R.S. § 41-2578(C)(2); see also Section 5.3.8.1. For procurements exceeding $50,000, such notice must include at least one advertisement in a newspaper of general circulation or an industry trade publication, with such notice published at least fifteen days before the RFQ offer due date. A.A.C. R2-7-504. Awards of contracts for such services shall be based on demonstrated competence and qualifications for the type of services required and at fair and reasonable prices. A.R.S. § 41-2578(B).

5.3.10.2 Evaluation and Negotiation. For an RFQ for the professional services listed in this section, a selection committee, established in accordance with A.A.C. R2-7-505, must evaluate the qualifications of the offerors and conduct interviews, if possible, in accordance with A.R.S. § 41-2578(C). The selection committee must evaluate the offerors using the criteria in the RFQ, looking only at qualifications, competency, and experience. A.R.S. § 41-2578(C). The selection committee must then create a list of at least three offerors, ranking them based on qualifications. Id. Neither the selection committee nor the purchasing agency shall request or consider fees, price, man-hours or any other cost information at any point in the selection or evaluation process, including in the selection or ranking of offerors. Id.

After the selection or evaluation process prescribed in A.R.S. § 41-2578(C), the procurement officer shall enter into negotiations for a fair and reasonable contract price with the highest ranked offeror. A.R.S. § 41-2578(E). Such negotiations must include “consideration of compensation and other contract terms that the procurement officer determines to be fair and reasonable . . . .” Id. If the procurement officer is unable to negotiate a satisfactory contract with the most qualified person or firm, the procurement officer may negotiate with the next most qualified person or firm in sequence until an agreement is reached or all proposals are rejected. Id.

5.3.10.3 Alternative to A.R.S. § 41-2578(E). As an alternative to A.R.S. § 41-2578(E), the procurement officer may award design-build construction services or job-order-contracting construction services as prescribed in A.R.S. § 41-2578(F). After the
5.3.11 Procurement of Information Systems and Telecommunications Systems. A contract for information systems or telecommunications systems may be procured either by IFB or by RFP. A.R.S. § 41-2553. The IFB or RFP evaluation criteria must include “total life cycle cost and application benefits” to the using agency. Id. See A.R.S. § 41-2553(D) for definitions.

5.3.12 Procurement of Earth-Moving, Material Handling, Road Maintenance and Construction Equipment. A contract for earth moving, material handling, road maintenance or construction equipment may be procured either by IFB or by RFP. A.R.S. § 41-2554. The IFB or RFP evaluation criteria must include “total life cycle cost including residual value.” Id. See A.R.S. § 41-2544(D) for definitions.

5.3.13 Public - Private Partnership Contracts. The Director of DOA may enter into public - private partnership contracts to finance the technology needs of a purchasing agency. A.R.S. § 41-2559. “[A] public-private partnership contract is a government contract and not a partnership.” A.A.C. R2-7-G305(A). The procedures for the solicitations and the terms of the contracts are in A.R.S. § 41-2559 and A.A.C. R2-7-G305. The requesting agency chief procurement officer must obtain written approval from the State Procurement Administrator before entering into a public-private partnership contract. A.A.C. R2-7-G305(B) and –G305(C). Such contracts must be procured in accordance with the procedures set forth in A.R.S. §§ 41-2533 (competitive sealed bidding), 41-2534 (competitive sealed proposals), 41-2535 (procurements not exceeding $50,000), 41-2536 (sole source procurements) or 41-2537 (emergency procurements). Id. at § (D).

5.4 General Procurement Requirements.

5.4.1 Responsible Bidder. Irrespective of the applicable procurement procedure, a contract may be awarded only to a responsible bidder or offeror. See A.R.S. §§ 41-2533(G), -2534(G); A.A.C. R2-7-B313, -C314. A responsible bidder is one who has the capability to perform the contract requirements and the integrity and reliability to assure good faith performance. Brown v. City of Phoenix, 77 Ariz. 368, 373, 272 P.2d 358, 361 (1954); Osborn v. Mitten, 39 Ariz. 372, 376, 6 P.2d 902, 904 (1932). Considerations for determining whether an offeror is responsible include: the offeror’s financial, business, personnel, and other resources, including its proposed subcontractors; record of performance and integrity; legal qualification to contract with the State; whether the offeror has been debarred or suspended; whether all necessary information concerning responsibility has been supplied; and whether the offeror meets all responsibility criteria.
specified in the solicitation. A.A.C. R2-7-B313(B), -C312(B). An unreasonable failure to supply information is grounds for determining that the offeror is not responsible. A.R.S. § 41-2540(A). Information on responsibility 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. A.R.S. § 41-2540(B); A.A.C. R2-7-B313(D), -C314(D).

Responsibility determinations shall be made by the agency chief procurement officer. A.A.C. R2-7-B313(A), -C312(A). Before a bidder or offeror is disqualified from receiving an award on the ground that he or she is not responsible, the decision-making authority should contact the Attorney General's Office for legal guidance.

5.4.2 Prequalification of Contractors. Prospective contractors may be prequalified for various types of contracts. A.R.S. § 41-2541. Prequalified contractors have a continuing duty to inform the State of material changes that might affect prequalification. Id. Prequalified contractors shall be included on solicitation mailing lists of potential contractors. Id.

5.4.3 Requests for Information. An agency chief procurement officer may issue a Request for Information (RFI) seeking information on available materials and services. A.R.S. § 41-2555; A.A.C. R2-7-G301. A response to an RFI is not an offer and cannot be used to form a binding contract. A.A.C. R2-7-G301.

5.4.4 Conformity of Invitation for Bids (IFB) or Request for Proposals (RFP) to Specifications. Bids and proposals must conform in all material respects to the IFB or RFP, and the specifications included therein, in order to be considered for award of a contract. A.R.S. §§ 41-2533(G), -2534(G), -2538(E), -2553(A), -2553(B); A.A.C. R2-7-B312, -C316. Minor or insignificant variations from specifications do not prohibit the awarding of a contract, but a variation from a specification designated as mandatory ("shall") may not be considered as insignificant or minor and may require invalidation of the bid or proposal. Ariz. Att'y Gen. Op. I78-94.

5.4.5 Bid and Contract Security. Depending upon the nature of the performance, the need for future protection to the State, and specific statutory requirements, various forms of bid and contract security may be required. See, e.g., A.R.S. §§ 41-2542, 41-2573, 41-2574; A.A.C. R2-7-506, -508, -509, and -510. The requirement for security must be included in the invitation for bids or request for proposals. A.R.S. § 41-2542; A.A.C. R2-7-506. Noncompliance with the bid security provisions in an IFB or an RFP is grounds for rejection of the bid or proposal. A.R.S. § 41-2573(D).

5.4.5.1 Construction and Construction Services Contracts. Bidding, awarding, and performance of construction and construction services contracts are governed by the following statutory and rule security requirements.
A bid for construction or construction services exceeding the amount set forth in A.R.S. § 41-2535 must be accompanied by bid security. A.R.S. § 41-2573(A); but see A.A.C. R2-7-506 (requiring bid security provisions in all state construction solicitations). Upon award, a contract performance bond and a payment bond must be provided as specified in A.R.S. § 41-2574. At the option of the contractor, the contractor may provide substitute security in a form authorized by the Director of DOA. Id. See also A.A.C. R2-7-506(C), -508(A), -509 and -510; but see A.R.S. § 41-2576(D) (substitute security acceptable only if contractor waives right to offset). With certain exceptions, “[t]en percent of all construction contract payments shall be retained by this state [to ensure] proper performance.” A.R.S. § 41-2576(A). When a construction contract is fifty percent completed, and if the contractor is progressing satisfactorily, one half of the amount retained shall be paid to the contractor and only five percent of subsequent progress payments shall be retained. Id. § (B). 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(A).

5.4.6 Cost or Pricing Data. When it is in the best interest of the State and under other circumstances, contractors may be required to submit certified cost or pricing data so that it can be determined if the costs are fair and reasonable. A.R.S. § 41-2543; A.A.C. R2-7-701 to -705. For contracts or contract modifications that exceed $100,000, the agency chief procurement officer shall determine in writing that the price is fair and reasonable only if the price is based on adequate competition, supported by established catalog or market prices, set by law or rule, or supported by relevant historical price data. A.A.C. R2-7-702(A). Failure of an offeror to submit cost or pricing data may be grounds for rejection of a bid or offer. A.A.C. R2-7-704.

For contracts that provide for the reimbursement of costs, the allowability of those costs shall be governed by the cost principles set forth in the Code of Federal Regulations, 48 C.F.R. 31 (September 2001). A.A.C. R2-7-701.

5.4.7 Written Contracts. A bid in response to an Invitation for Bids (IFB) or a proposal in response to a Request for Proposals (RFP) or a Request for Qualifications (RFQ) is an offer to contract upon the terms contained in the IFB, RFP, or RFQ and does not become a contract unless and until it is accepted by making an award. Universal Constr. Co. v. Ariz. Consol. Masonry & Plastering Contractors Ass'n, 93 Ariz. 4, 8, 377 P.2d 1017, 1019 (1963). “[A] public agency that accepts a bid on a public contract is not bound until a formal contract exists.” See Ry-Tan Constr., Inc. v. Washington Elementary Sch. Dist. No. 6, 210 Ariz. 419, 421, ¶ 13, 111 P.3d 1019, 1021 (2005).

Payment for services shall be made only pursuant to a written contract. A.R.S. § 41-2513(E). Generally, any type of contract that promotes the state’s interests may be used, except that cost-plus-percentage-of-cost contracts are prohibited. A.R.S. § 41-2544. “The agency chief procurement officer shall include in solicitations and contracts all contract clauses necessary to ensure the state’s interests are addressed.” A.A.C. R2-7-601. The State Procurement Administrator shall publish uniform terms and conditions for

5–17 Revised 2011
use in solicitations and contracts. A.A.C. R2-7-606. The form of the contract that the successful contractor will be required to sign should be attached to the IFB or RFP, and offer terms and conditions must be included in the solicitation. A.A.C. R2-7-B301(C)(3) and –C301(E)(3).

A provision in a construction contract that makes the contract subject to the laws of another state or requires any litigation, arbitration, or other dispute resolution proceeding to be conducted in another state is void and unenforceable. A.R.S. § 41-2583.

5.4.8 Indemnity Agreements in Construction and Architect-Engineer Contracts Void. Agreements in construction and architect-engineer contracts or subcontracts that purport to indemnify, hold harmless, or defend the promisee from or against any liability for loss or damage resulting from the promisee’s own negligence are against public policy and are void. A.R.S. § 41-2586(A). Notwithstanding subsection A, a contractor may indemnify an entity for whose account the construction contract or subcontract is not being performed and who enters into an agreement with the contractor that permits the contractor to enter on or adjacent to its property to perform the construction contract or subcontract for others. A.R.S. § 41-2586(B).

5.4.9 Modification, Correction, and Withdrawal of Bids. A bidder or offeror may modify or withdraw its bid or proposal in writing any time before the time and date set for bid or proposal opening. A.R.S. §§ 41-2533(F), -2534(F); A.A.C. R2-7-B304, –C304, and -F306. If an offer, modification or withdrawal is received after the time and date set for bid opening, it is late and will be rejected unless it would have been timely received but for the action or inaction of state personnel. See A.A.C. R2-7-B307, –C307, –F306(C), and –F307. In multistep sealed bidding, an offeror may withdraw its offer any time during phase one of the multistep sealed bidding process. A.A.C. R2-7-B316(J); see Section 5.3.8.1.3.

If a mistake in an offer is discovered after bid opening and before award, the agency chief procurement officer may permit the offeror to correct the mistake or withdraw the offer if correction or withdrawal is consistent with fair competition and not prejudicial to the interests of this state. A.A.C. R2-7-B310, -C315(C), –C315(D), and -507. “After bid opening, no corrections in bid prices or other provisions of bids prejudicial to the interest of this state or fair competition shall be permitted.” A.R.S. § 41-2533(F). If a mistake is discovered after award, the agency chief procurement officer, considering the best interests of the state and of fair competition, may allow correction so long as the dollar amount remains less than the nearest bid or offer, may cancel all or part of the award, or may deny the request for correction or withdrawal. A.A.C. R2-7-B315, –C318, and –F310.

5.4.10 Solicitation Amendments. An agency chief procurement officer shall issue a solicitation amendment when necessary to make changes in the solicitation, correct defects or ambiguities, provide additional information or instruction, or extend the solicitation deadline. A.A.C. R2-7-B303, -B316(E), -C303, and -F303. The agency chief procurement officer must notify all persons or firms to whom the IFB, RFP or RFQ was distributed. Id.
5.4.11 Cancellation of Solicitation. Before or after bid opening, the agency chief procurement officer may cancel the procurement solicitation 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 this state. A.R.S. § 41-2539. Each solicitation shall state that it may be cancelled or bids or proposals rejected. A.A.C. R2-7-B301(C)(j) and –C301(E)(j). Notice of the cancellation must be sent to all persons who received or responded to the solicitation and the reasons for cancellation or rejection must be made a part of the contract file. A.R.S. § 41-2539; A.A.C. R2-7-B305, -B308, -C305, and –C308.

5.4.12 Multiterm Contracts. If the term of the contract and any conditions of renewal or extension 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 five years. A.R.S. § 41-2546(A). Contracts for job-order-contracting construction services may also be entered into for a period up to five years, if in the best interests of this state. Id. Contracts for materials or services may be for more than five years if the Director of DOA determines in writing that it would be advantageous to the state. Id.; A.A.C. R2-7-605. 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. Id. A multiterm contract should contain a clause providing for its automatic termination without liability beyond that authorized by statute whenever the Legislature fails to authorize the expenditure of monies to continue the term of the contract beyond the current fiscal year. See A.R.S. § 41-2546(C); A.A.C. R2-7-605(C).

5.4.13 Right to Inspect Plant and Audit Records. The state retains the right, at any reasonable time, to inspect the plant or the place of business of any contractor or subcontractor related to a contract awarded by the state. A.R.S. § 41-2547. The state is entitled to audit the books and records of any contractor or subcontractor under any contract awarded by the state to the extent that the books and records relate to the performance of that contract. A.R.S. § 41-2548(B). The state may, at reasonable times and places, audit the books and records of any person who submits cost and pricing data, as provided in A.R.S. § 41-2543, to the extent that the books and records relate to the cost and pricing data. A.R.S. § 41-2548(A). All contracts shall provide that all records relating to the contract are subject to inspection and audit by the state for five years after completion of the contract and that such records must be produced at the state offices designated in the contract. A.R.S. §§ 35-214, 41-2548.

5.4.14 Conflict of Interest. It is a conflict of interest for a public officer or employee of a public agency who has a substantial interest in any contract, sale, purchase, service or decision of that public agency to participate in any manner in that contract, sale, purchase, service or decision. A.R.S. § 38-503; see also Ariz. Att’y Gen. Op. I03-005 (“The prohibition against participating in a decision or a contract, sale, or purchase . . . applies with equal force to participating in any way in the process leading up to a decision.”). Substantial interests means a pecuniary or proprietary interest, direct or indirect, other than
one of the ten remote interests defined in A.R.S. § 38-502(11). A.R.S. § 38-502(11).

No public officer or employee of a public agency shall supply any equipment, materials, supplies, or service to that public agency except pursuant to a contract awarded through public competitive bidding. A.R.S. § 38-503(C); see also Maucher v. City of Eloy, 145 Ariz. 335, 701 P.2d 593 (App. 1985). Except as noted in A.R.S. § 38-503(C)(2), the requirement for competitive bidding applies to all contracts regardless of amount, including contracts not exceeding the amount prescribed in A.R.S. § 41-2535 and contracts for purchases of $5,000 or less. See Ariz. Att’y Gen. Op. I06-002 (purchases from employees must follow procurement code procedures regardless of the procurement’s total cost).

A person who violates these prohibitions may be guilty of a felony (intentional or knowing violation) or a misdemeanor (reckless or negligent violation) and shall forfeit public office or employment. A.R.S. § 38-510; see Sections 5.8.2 and 5.8.3. A public agency may void any contract entered into in violation of these prohibitions. A.R.S. § 38-506(A). 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.

5.4.15 Personal Use Prohibition. “State employees and public officers shall not purchase materials or services for their own personal or business use from contracts entered into by the state unless authorized in writing by the Director [of DOA].” A.A.C. R2-7-204.

5.4.16 Prohibition Against Discrimination. Contractors must agree to comply with Chapter 9, Title 41, Arizona Revised Statutes (Civil Rights) and Executive Order No. 99-4 (amending Executive Order No. 75-5; current version at Historical and Statutory Notes, A.R.S. § 41-1463).

5.4.17 On-line Bidding. If an agency chief procurement officer determines that on-line bidding is more advantageous than other procurement methods, then the procurement officer may use on-line bidding to obtain bids electronically. A.R.S. § 41-2672; A.A.C. R2-7-1301. Before an agency chief procurement officer can proceed with on-line bidding, he or she must submit a written request and receive written approval from the State Procurement Administrator. A.A.C. R2-7-1301.

5.5 Materials Management. DOA is charged with managing all state materials during their entire life cycle, including disposing of excess and surplus materials. A.R.S. § 41-2602; A.A.C. R2-15-301 to -310.

5.5.1 Disposition of Surplus Materials. No using agency, except the Department of Public Safety, the Arizona Exposition and State Fair Board, and the Arizona Correctional Industries may transfer, sell, trade-in, condemn, or otherwise dispose of materials owned by the State without written authorization of the Surplus Property Administrator at DOA. A.R.S. §§ 3-1007(A)(1), 41-1623(E), 41-1624(B), 41-1713(B)(6); A.A.C. R2-15-303(B).
Using agencies must notify the Surplus Property Administrator of all excess and surplus materials in the manner prescribed by the Surplus Property Administrator. A.A.C. R2-15-303(C). The Surplus Property Administrator shall then dispose of the excess and surplus materials through competitive bidding or one of the other methods identified in A.A.C. R2-15-303(E).

5.6 Legal and Contractual Remedies.

5.6.1 Exclusive Remedy. Any solicitation or contract claim or controversy made by any bidder, offeror, or contractor may be asserted against the State or an agency of the State only under the procedures set forth in Article 9 of the Arizona Procurement Code and the rules promulgated thereunder. A.R.S. § 41-2615; see A.A.C. R2-7-A901 to –A911, -B901 to -B905, -C901 to -C911, and -D901 to -D902. 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 complying with the applicable rules and procedures. 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) do not apply to a claim against the State relating to a procurement governed by the Procurement Code. Id. A claim or controversy arising from a procurement not governed by the Procurement Code is addressed in Section 13.6.5.

5.6.2 Protested Solicitations and Awards.

5.6.2.1 Procurement Officer. The procedure for resolving protested solicitations and awards is authorized by A.R.S. §§ 41-2611 through 41-2617 and found in A.A.C. R2-7-A901 to –A911. A protest is commenced when an "interested party," i.e., an offeror or prospective offeror whose economic interest is affected (see A.A.C. R2-7-101(31)), files a written protest with the agency chief procurement officer, with a copy to the State Procurement Administrator. A.A.C. R2 -7-A901(B). The written protest must contain, among other things, a detailed statement of the legal and factual grounds of the protest and the form of relief requested. Id. In most cases, absent a written extension of time from the agency chief procurement officer, protests of the terms of a solicitation must be filed before the applicable bid opening or the closing date of the solicitation. A.A.C. R2-7-A901(C) and –A901(E); see also Arizona’s Towing Prof’ls, Inc. v. State, 196 Ariz. 73, 76, ¶ 15, 993 P.2d 1037, 1040 (App. 1999) (“Requiring protests related to errors apparent on the face of the bid to be filed before the bid opening protects the integrity of the bid process.”). In the remaining cases, absent an extension, protests must be filed within ten days after the agency chief procurement officer makes the procurement file available to the public. A.A.C. R2-7-A901(D) and –A901(E). The agency chief procurement officer may consider untimely protests only for good cause. A.A.C. R2-7-A901(F). “The agency chief procurement officer shall immediately give notice of a protest to all offerors.” A.A.C. R2-7-A901(G). If a protest is filed before the solicitation due date, the contract award, or performance of the contract, the agency chief procurement officer or the State Procurement Administrator may stay all or part of a procurement if there is a reasonable possibility that the protest will be upheld or that a stay is in the best interests of the state, or
may permit the solicitation, award or contract performance to proceed. A.A.C. R2-7-A902.

“The agency chief procurement officer has the authority to resolve a protest.” A.A.C. R2-7-A903(A). Within fourteen days after a protest has been filed, unless extended for a period not to exceed thirty days, the procurement officer must issue a written decision explaining the reasons for the decision, and if the protest is sustained in whole or in part, select one of the remedies in A.A.C. R2-7-A904. A.A.C. R2-7-A903. The decision must be accompanied by a statement that the protesting party may appeal the decision to the Director of DOA within thirty days from the receipt of the decision. A.A.C. R2-7-A903(B). If the agency chief procurement officer fails to issue a decision within these time limits, the protestor may proceed as if the agency issued an adverse decision. A.A.C. R2-7-A903(E).

5.6.2.2 Appeals to the Director. An interested party who is dissatisfied with a decision of the agency chief procurement officer may file an appeal with the Director of DOA within thirty (30) days from the date the decision is received. A.A.C. R2-7-A905(A). The appeal must contain the information listed in A.A.C. R2-7-A905(B). The Director of DOA may consider untimely appeals for good cause. A.A.C. R2-7-A905(C). Within fourteen days after the appeal is filed, the agency chief procurement officer must file a complete report responding to the appeal. A.A.C. R2-7-A908(A). The response must include the information listed in A.A.C. R2-7-A908(A). The appellant may file comments to the procurement officer’s report within ten days of receiving that report. A.A.C. R2-7-A908(C). If the Director does not dismiss the appeal pursuant to A.A.C. R2-7-A910, a hearing shall be conducted. A.A.C. R2-7-A911. See Section 5.6.5. If the Director of DOA sustains the appeal, in whole or in part, the Director shall implement the remedies in A.A.C. R2-7-A904. A.A.C. R2-7-A909.

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-B901 to -B905. A.R.S. §§ 41-2611, -2612, -2615. The first step in resolving a controversy is for a claimant to file a claim with the agency chief procurement officer within 180 days after the claim arises. A.A.C. R2-7-B901(A). The claim shall include, among other things, a detailed statement of the legal and factual grounds of the protest and the form and dollar amount of relief requested. Id. The agency chief procurement officer has the authority to settle the problem by mutual agreement, subject to prior written approval by the State Procurement Administrator for claims in excess of the amount prescribed in A.R.S. § 41-2535. Id. § (B). If the claimant and the agency chief procurement officer cannot settle the claim, the procedures discussed in Sections 5.6.3.1 and 5.6.3.2 must be followed.

5.6.3.1 Claims Initiated by the Contractor. Once the contractor determines that it cannot reach a settlement with the procurement officer, the contractor may request a written final decision of the agency chief procurement officer. A.A.C. R2-7-B902(A). The agency chief procurement officer must issue the decision within sixty days, and the decision must include the items listed in A.A.C. R2-7-B902(B). If the agency chief procurement officer fails to issue a decision within the time prescribed, the contractor may
proceed as if the agency chief procurement officer had issued a decision adverse to the contractor. A.A.C. R2-7-B903.

If the contractor disagrees with the decision of the agency chief procurement officer, the contractor has thirty days from receipt of the decision to file an appeal with the Director of DOA. A.A.C. R2-7-B904(A). The appeal shall contain "[t]he precise factual or legal error in the decision of the agency chief procurement officer." A.A.C. R2-7-B904(B)(3). The agency chief procurement officer then has fourteen days after the appeal is filed to file a complete report on the appeal with the Director of DOA and mail a copy of the report to the claimant. A.A.C. R2-7-B904(C). Hearings are conducted as contested cases pursuant to the Administrative Procedure Act. A.A.C. R2-7-B904(D). See Section 5.6.5.

5.6.3.2 Claims Initiated by the State. When an agency chief procurement officer determines that a claim asserted by the State will not be resolved by mutual agreement, the agency chief procurement officer must promptly refer the claim to the Director of DOA for a hearing. A.A.C. R2-7-B905. See Section 5.6.5.

5.6.4 Debarring or Suspending a Person from Participating in State Procurements. The Director of DOA has the sole authority to debar or suspend contractors. A.A.C. R2-7-C901. Section 41-2613, A.R.S., and A.A.C. R2-7-C901 to –C911 establish the authority and procedures for the Director of DOA to suspend or debar a contractor from participating in state procurements. The Director of DOA may suspend a contractor for up six months and may debar a contractor for up to three years. A.R.S. § 41-2613(A); A.A.C. R2-7-C903. The grounds for suspension or debarment include, but are not limited to, conviction of a criminal offense arising from obtaining or attempting to obtain a contract; embezzlement; theft; fraudulent schemes, artifices and practices; bid rigging; perjury; forgery; bribery; falsification or destruction of records; receiving stolen property; any offense indicating a lack of business integrity or honesty, violation of antitrust statutes, violations of contract provisions, or debarment by another governmental entity. A.R.S. § 41-2613(B).

Any suspension of more than 35 days requires written notice that includes the items listed in A.A.C. R2-7-C910. A.A.C. R2-7-C909. A contractor must file a request for hearing within 30 days of receipt of a notice of suspension. A.A.C. R2-7-C910(C). If debarment is proposed, the Director must provide written notice to the contractor within seven days. A.A.C. R2-7-C904(A). The person to be debarred has ten days from the receipt of the Director’s notice of proposed debarment to file a request for hearing. A.A.C. R2-7-C904(B). During the period when debarment is pending, the Director shall not suspend the contractor absent compelling reasons necessary to protect state interests. A.A.C. R2-7-C908(C). The hearings required for debarment and suspension must be conducted as provided in Section 5.6.5. A.A.C. R2-7-C904(C).

The Director of DOA shall maintain a master list of persons debarred or suspended. A.A.C. R2-7-C911. Upon a written determination that participation of a debarred person is advantageous to the state, the Director of DOA may allow a debarred person to participate
in state contracts on a limited basis. A.A.C. R2-7-C907. The Director of DOA may also reinstate a debarred person or rescind the debarment upon written determination that the cause for the debarment no longer exists. A.A.C. R2-7-C906(A). The Director’s reinstatement decision is not subject to administrative review. A.A.C. R2-7-C906(E).

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. § 41-1092 through § 41-1092.12) and A.A.C. R2-7-D901 and –D902. A.R.S. § 41-2611. The Director of DOA may direct the parties to engage in settlement negotiations or alternative dispute resolution procedures before scheduling a hearing. A.A.C R2-7-D901. Generally, the Director of DOA refers the matters to the Office of Administrative Hearings where a hearing officer conducts prehearings, hearings, and related matters. At the conclusion of the hearing, the hearing officer prepares and submits proposed findings of fact and conclusions of law, and a recommended decision to the Director of DOA. A.A.C. R2-7-D901. The Director of DOA may accept, modify, or reject the recommendation in whole or in part. A.R.S. § 41-1092.08(B).

5.6.6 Rehearing. Any party aggrieved by the Director’s decision, including an agency chief procurement officer, may file a written request for rehearing of a decision within thirty days after receipt of the decision. A.R.S. § 41-1092.09(A); A.A.C. R2-7-D902(A).

5.6.7 Judicial Review of Administrative Decisions. Within thirty-five days of the Director of DOA’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. A.R.S. § 41-2614. Judicial review is governed by A.R.S. §§ 12-901 to -914. Id.

5.7 Intergovernmental Procurement.

5.7.1 Cooperative Purchasing. Any public procurement unit² may participate in, sponsor, conduct, or administer a cooperative purchasing agreement with one or more public procurement units to procure any materials, services, professional services, construction or construction services. A.R.S. § 41-2632(A). Such an agreement is exempt from A.R.S. § 11-952(D) concerning intergovernmental agreements. Id. Before participating in a cooperative purchasing agreement, agency chief procurement officers must submit a written request to the State Procurement Administrator. A.A.C. R2-7-1001(B). Agency chief procurement officers may use Arizona state contracts without a cooperative purchasing agreement. A.A.C. R2-7-1001(A).

² A “[p]ublic procurement unit’ means either a local public procurement unit, the department [of Administration], any other state or an agency of the United States.” A.R.S. § 41-2631(4). A “‘local public procurement unit’ means any political subdivision and any agency, board, department or other instrumentality of such political subdivision and any nonprofit corporation created solely for the purpose of administering a cooperative purchase . . .” A.R.S. § 41-2631 (2).
Parties under a cooperative purchasing agreement may cooperatively use materials or services; commonly use or share warehousing facilities, capital equipment, and other facilities; provide personnel; and make available to other public procurement units informational, technical or other services or software that may assist in improving the efficiency or economy of procurement. A.R.S. § 41-2632(A). A public procurement unit requesting personnel or services must pay the public procurement unit providing the personnel or services the costs of providing the personnel or services. Id. An agency chief procurement officer administering a cooperative purchasing agreement must ensure that the cooperative purchasing agreement includes the required provisions set forth in A.A.C. R2-7-1002(A).

5.7.1.1 Compliance with Procurement Code. "If the public procurement unit administering a cooperative purchase complies with [the Procurement Code], any public procurement unit participating in such a purchase is deemed to have complied with [the Procurement Code]." A.R.S. § 41-2634. "Public procurement units may not enter a cooperative purchasing agreement for the purpose of circumventing [the Procurement Code]." Id.

5.7.1.2 Controversies. Controversies arising under a cooperative purchasing agreement in which the State is a party must be resolved pursuant to A.R.S. § 41-2611 through § 41-2617. A.R.S. § 41-2635; see also Section 5.6.

5.7.2 Purchasing from the Arizona Industries for the Blind and from Arizona Correctional Industries. A committee appointed by the Director of DOA designates the materials and services provided by the Arizona Industries for the Blind, certified nonprofit agencies for disabled individuals (as defined in A.R.S. § 41-2636(G)(1) and A.A.C. R2-7-1004 and -1005), and the Arizona Correctional Industries that satisfy state governmental unit requirements and establishes the purchase price for such materials and services offered for sale. A.R.S. § 41-2636(A); A.A.C. R2-7-1003 through -1009. State governmental units must purchase these materials and services if they are readily available. A.R.S. § 41-2636(C); Ariz. Att’y Gen. Op. I79-35. Purchases of approved materials and services directly from the Arizona Industries for the Blind, certified nonprofit agencies for disabled individuals, and the Arizona Correctional Enterprises are exempt from competitive bidding. Id. § (D); A.A.C. R2-7-1008.

5.7.3 General Services Administration Contracts. The Director of DOA or the director’s designee may evaluate general services administration (GSA) contracts and may authorize agencies to purchase materials and services from approved GSA contracts. A.R.S. § 41-2558; A.A.C. R2-7-G304. If the agency chief procurement officer makes a written determination that use of the GSA contract is in the best interests of the state, such a contract may be used so long as it satisfies the criteria set forth in A.A.C. R2-7-G304(A). Id.
5.8 Violation of the Procurement Code.

5.8.1 Enforcement of the Procurement Code. The Attorney General enforces the Procurement Code on behalf of the State. A.R.S. § 41-2616(D).

5.8.2 Civil Penalty. "A person who contracts for or purchases any material, services, construction or construction services in a manner contrary to the requirements of [the Procurement Code], [and] the rules adopted pursuant to [the Procurement Code] . . . is personally liable for the recovery of all public monies paid plus twenty percent of such amount and legal interest from the date of payment and all costs and damages arising out of the violation.” A.R.S. § 41-2616(A).

A person serving on an evaluation committee who fails to disclose unauthorized contact with a competing vendor or who fails to provide accurate information on the required disclosure statement is subject to a civil penalty of at least one thousand dollars but not more than ten thousand dollars. A.R.S. § 41-2616(C).

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

5.8.4 Reporting of Anticompetitive Practices. “If for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the director [of DOA] and the attorney general.” A.R.S. § 41-2549.

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 and prevent anticompetitive activity, and should therefore be familiar with the antitrust laws and be able to recognize anticompetitive practices. The procurement officer has three responsibilities under antitrust law: first, to prevent claims that he or she or the agency he or she represents has engaged in unlawful anticompetitive conduct; second, to detect anticompetitive conduct by vendors; and third, to ensure that all procurement procedures protect and enhance competition.

The following sections discuss state and federal antitrust laws with an emphasis on their application to the operations of state government. The sections will identify some of the conduct prohibited under antitrust laws, discuss remedies available to those injured by restraints of trade, and generally assist government employees in understanding antitrust laws and recognizing unlawful or anticompetitive practices.
5.9.2 Objectives of the Antitrust Laws. The objectives of the antitrust laws are to maintain competition, to protect consumer choice, and to reduce the concentration of inordinate wealth and economic resources in too few firms. Competition exists when a large number of firms are striving to attract customers.

In a competitive market, the consumer, including the government purchaser, attains the highest quality goods at the lowest possible prices. Where vendors must compete, they cannot elevate prices and reduce quality without suffering a loss of customers. Only if there are readily available alternative sellers can customers switch suppliers. This ability to switch drives the market and keeps downward pressure on price and upward pressure on quality. Competition also promotes free access to the marketplace, induces new firms to enter, promotes better market performance, encourages new technology and high productivity, and conserves resources.

Because public procurement is a large component of all purchasing in any economy, diligent procurement officers promote competition and provide an important public service.


5.9.3.1 The Sherman Antitrust Act. The Sherman Antitrust Act was passed in 1890 and has remained virtually unchanged since its enactment. Sherman Antitrust Act, Ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7) (Sherman Act). The Sherman Act is the primary federal antitrust law and prohibits contracts and conspiracies in restraint of trade, conspiracies to monopolize, and attempts to monopolize. Section 2 of the Sherman Act proscribes monopolization. It applies to all "persons," including governments and their employees. 15 U.S.C. § 15. Both the United States Department of Justice and the Arizona Attorney General may enforce the Sherman Act in federal court, and injured private parties may also sue for treble damages. 15 U.S.C. §§ 15, 15a, 15c. Although the Sherman Act, and all federal antitrust law, applies only to interstate commerce, the courts have found interstate commerce to be present in virtually every commercial transaction. See, e.g., Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976).

Because every contract is in a sense a restraint of trade, the courts have construed the Sherman Act to prohibit only unreasonable restraints of trade and competition. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

Since 1974, a violation of the Sherman Act has been a felony, prosecutable by the United States Department of Justice. 15 U.S.C. §§ 1-3. An offense carries a maximum fine of $10 million for corporations and $350,000 for individuals. Id. Individuals found guilty can be imprisoned for up to three years, fined, or both. Id. Highway construction bid-rigging cases have typically been prosecuted criminally.

It prohibits price discrimination (Robinson-Patman Price Discrimination Act, ch. 592, § 2-4, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13b, 21a), tying arrangements, certain mergers and acquisitions, interlocking directorates between competing companies, and certain exclusive deals and refusals to deal where their effect is to substantially lessen competition or to tend to create a monopoly in interstate commerce.

The Clayton Act permits private parties to sue for treble damages and costs including attorney's fees. 15 U.S.C. § 15. Private litigants and state Attorneys General can recover three times the actual damages from an unlawful trade restraint. 15 U.S.C. § 15c. The Clayton Act addresses the relationship between private and public lawsuits and gives the state Attorneys General the right to sue as parens patriae, a representative of consumers in their state. Id.


5.9.4 State Antitrust Laws.

5.9.4.1 Uniform State Antitrust Act. The Uniform State Antitrust Act, A.R.S. §§ 44-1401 to 1416, was adopted by the Arizona Legislature in 1974 pursuant to a provision in art. XIV, § 15 of the Arizona Constitution requiring the Legislature to enact laws prohibiting monopolies, trusts, and certain direct or indirect anticompetitive conduct. The Legislature added A.R.S. § 44-1416 in 1993. The Act forbids contracts, combinations, and conspiracies "in restraint of, or to monopolize, trade or commerce, any part of which is within [Arizona]." A.R.S. § 44-1402. It also prohibits "[t]he establishment, maintenance or use of a monopoly" and an attempt to monopolize Arizona trade or commerce for the purpose of excluding competition or of fixing prices. A.R.S. § 44-1403. The Act is to be construed uniformly with other states having similar Acts, and in construing the Act, Arizona courts may use federal legal precedent as a guide. A.R.S. § 44-1412.

The Attorney General, or a County Attorney with the Attorney General's permission, may enforce the Act and seek injunctions and civil penalties of up to $150,000 per violation. A.R.S. § 44-1407. The Attorney General has the power to investigate violations of the Act and may issue Civil Investigative Demands (CIDs) seeking testimony and documents, and may enforce the CIDs in state court. A.R.S. §§ 44-1406, 1414.
The State, a political subdivision, or any agency may sue for injunctions, damages, costs, and attorney's fees. A.R.S. § 44-1408(A). A private party may sue for the same and, if the violation is "flagrant," the private party may recover up to three times the damages sustained. *Id.* § (B).

An action to enforce the Act must be brought within four years of the violation, A.R.S. § 44-1410, but a private party has one year after the conclusion of a state prosecution within which to bring an action for damages. *Id.* § (B).

For most contracts, combinations, or conspiracies, the Act does not provide a criminal penalty. In 1993, however, the Legislature made it a Class 4 felony for a person to enter a contract, combination, or conspiracy to restrain trade in connection with a government contract or subcontract. A.R.S. § 44-1416(C). Furthermore, criminal liability for bid-rigging can be found in the bid-rigging statutes, A.R.S. §§ 34-251 to 258, specifically at § 34-252.

5.9.4.2 Bid-Rigging Statutes. Sections 34-251 to 34-258, A.R.S., are sometimes referred to as the bid-rigging statutes. The Attorney General or a county attorney may enforce these statutes. A.R.S. § 34-258.

It is a class 4 felony for any person to enter into a contract, conspiracy, or other trade restraint that violates the Uniform Antitrust Act if the transaction involves a government contract for the purchase of equipment, labor, or materials or a contract for the construction, repair, or alteration of highways, buildings, or structures. A.R.S. § 34-252(A). The statute applies to any illegal subcontract with a contractor or "proposed" contractor for a governmental agency. *Id.* §§ (A) (1) and (A) (2). See also A.R.S. § 44-1416(C).

The government agency that has entered into or been the "subject" of an unlawful anticompetitive contract may sue the parties to the contract to recover damages. A.R.S. § 34-254(A). The agency may recover treble damages or ten percent of the contract price. *Id.* § (B). The cause of action accrues only when the illegal act is discovered. *Id.* § (C).

Persons (including corporations) convicted under the bid-rigging statutes are barred from further contracts with any governmental agency, either directly or indirectly, A.R.S. § 34-255(A), for up to three years, and can for that time period also be barred from employment by any corporation engaged in public works contracting or public works supplying. *Id.* § (B). An agency can suspend any person convicted of antitrust violations under Arizona law, federal law, or the law of another state, or any officer, employee, or affiliate of that person, from bidding to that agency. A.R.S. § 34-257. A person convicted of a violation of A.R.S. §§ 34-252 or 44-1401 et seq. cannot serve as a registrar of contractors or on the contractors' recovery fund board. A.R.S. § 34-256.

5.9.5 Conduct Illegal Under the Antitrust Laws. Various types of conduct may violate the antitrust laws. If an activity restrains trade, is anticompetitive, excludes competing vendors, limits consumer choice, favors dominant firms, creates barriers to entry
by new competitors, protects existing market shares, forces purchase of unwanted goods, involves economic coercion, or reduces price competition, it may be unlawful.

Every contract is in a sense a restraint of trade. However, the courts have construed the antitrust laws to proscribe only unreasonable restraints of trade and competition. See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911). Two types of restraints have been identified. First, there are per se type restraints, which are illegal on their face without proof of actual harm to competition. Wedgewood Inv. Corp. v. Int'l Harvester Co., 126 Ariz. 157, 613 P.2d 620 (App. 1979). These include price fixing, bid rigging, territorial market allocation, some types of tying arrangements, and some horizontal boycotts. See, e.g., United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (ban on competitive bidding); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (market division).

Per se cases almost always involve horizontal trade restraints. Horizontal restraints are those that are implemented by members of, and harm competition at, the same level of distribution. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Thus, agreements between retailers or between manufacturers are horizontal. Per se conduct is illegal regardless of whether the participants intend to harm competition and whether competition is in fact harmed. Id. The mere formation of the contract or conspiracy is illegal. N. Pac. Ry. v. United States, 356 U.S. 1 (1958). Even a well-intentioned activity that has the effect of stifling price can be price fixing. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978). In recent years, however, courts have used the per se analysis less frequently. United States v. Bestway Disposal Corp., 724 F. Supp. 62, 66 n6 (W.D.N.Y. 1988).

The second, and most common, type of trade restraint falls into the "rule of reason" category, where the restraints are unlawful only if, in fact, competition is unreasonably restrained. Id. Vertical restraints are often found to be governed by the rule of reason. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). An anticompetitive arrangement between a manufacturer and a retailer is a vertical restraint usually judged by the rule of reason; if competition in the general market is not harmed, the restraint is not unreasonable and not unlawful. Some vertical relationships can be per se illegal, if they include "some agreement on price or price levels." Bus. Elect's Corp. v. Sharp Elect's Corp., 485 U.S. 717, 735-36 (1988). Some conduct that restrains trade can be justified under the rule of reason by procompetitive efficiencies that result from the conduct. Cont'l T.V., Inc., 433 U.S. at 54.

5.9.5.1 Price Fixing. Any arrangement between competitors that interferes with the free market determination of price of any product is illegal. United States v. Serta Assocs., Inc., 296 F. Supp. 1121 (N.D. Ill. 1968), aff'd mem., 393 U.S. 534 (1969). These arrangements are per se unlawful, even if the purpose of the agreement is to lower prices. Id. If the prices are set by agreement between parties who, in a competitive market, would

A vertical form of price-fixing agreement arises when a manufacturer coerces its distributors from reselling the goods below a minimum price set by the manufacturer. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983). Such arrangements have been held to be per se illegal, even though they involve vertical trade restraints. *Id.*

Agreements to set minimum prices, or ranges of prices; to manipulate bid prices; to determine when prices rise or fall; or to stabilize prices and stop price wars are per se illegal. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332 (1982). Vertical agreements to set maximum prices, however, are not per se violations of antitrust law and are analyzed instead under the “rule of reason.” *State Oil Co. v. Khan*, 522 U.S. 3 (1997). Sometimes price manipulation occurs through third parties, as where the trade press is used as a vehicle to arrange coordinated price moves. In re: Petroleum Prods. Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990) (court found publisher of trade magazine that published price lists did not violate antitrust laws). *But see, State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n, Inc.*, 128 Ariz. 515, 627 P.2d 666 (1981). A government procurement officer can be used as a price-fixing vehicle if prices are quoted to him or her and he or she communicates these to competing vendors prior to bidding. Procurement officers should not engage in any activity that would aid vendors in learning their competitors' bid prices.

Price fixing can be prosecuted criminally under federal law. See Section 5.9.3.1.

**5.9.5.2 Bid Rigging.** Horizontal agreements among competitors to manipulate the competitive bidding process are per se illegal. *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991); *Harkins Amusement Enters. v. Gen. Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988). Bid rigging can involve agreements not to bid, to bid at set prices, to rotate bidding, to allocate customers, to manipulate the general contractor/subcontractor relationships, to give kickbacks to procurement officials, to give special favors for special treatment, and any other arrangements that interfere with free competitive bidding. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). On the other hand, joint ventures among entities that would not be able to bid independently can in some instances be seen as procompetitive if they have the effect of increasing the number of competitive bids.

Rigged bids result in higher prices and lower quality and service for the agency buyers because they eliminate the risk to the vendor of losing the bid by charging too much or offering inferior products or services.

Procurement officers should be alert for signs of bid rigging. Some ways of detecting bid rigging are described below. Government employees involved in any aspect of procurement should be careful in their contacts with vendors to prevent vendors from obtaining inside information or receiving special favors, such as bid specifications favorable
Bid rigging usually is prosecuted criminally by both federal and state officials.

5.9.5.3 Division of Markets - Territorial Market Allocation. Like price fixing, a horizontal agreement among competitors to eliminate competition by allocating markets is per se unlawful. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 608 (1972). "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990). These agreements usually divide markets territorially, by geographic regions. They can, however, divide markets by product type or brand or by type of customer. Rotating bids can be a form of market allocation.

Franchises, or exclusive rights to sell in a territory, are often part of distribution systems imposed by manufacturers in a vertical relationship. These can result in a lack of competition both between manufacturers and among distributors of the same manufacturer's products. Most garden variety exclusive franchises and exclusive distributorships are lawful. Some of these relationships have been held to promote competition, as where each different brand has its own exclusive distribution network. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

5.9.5.4 Tying Arrangements. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958)). Such an arrangement may violate § 1 of the Sherman Act “if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Id.* at 504 U.S. 462 (citing *Fortner Enters., Inc. v. U. S. Steel Corp.*, 394 U.S. 495, 503 (1969)).

This type of restraint can increase costs for government buyers because it might require the purchase of another product in order to acquire the desired one. This frequently happens where computer or technological systems are being purchased and the bid ties the product to various other products and services, such as maintenance and repair.

Forcing a buyer to use the service organization of a seller instead of allowing the buyer to bid service and maintenance separately from the equipment is a tying arrangement and can be illegal. *Eastman Kodak Co.*, 504 U.S. at 463. This is especially important where a buying agency is required to buy a particular brand of expensive equipment, but can get much better prices by separately bidding service and maintenance contracts to competitors in the service and repair markets.
Tying the price at which a bidder sells equipment to the purchase of service is not always unlawful. *Id.* Thus a vendor who bids equipment at a lower price if a service contract is also purchased, and a higher price if it is not, may not be unlawfully tying the products and services because the vendor is not refusing to sell unless the tied product is also purchased. However, depending on the availability of alternatives, this could be an unlawful trade restraint to the extent competition is actually harmed.

5.9.5.5 Group Boycotts - Horizontal Refusals to Deal. A group boycott occurs when horizontal competitors agree to refuse to do business with a third party. *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Group boycotts are employed to reduce the number of competitors in a market or to preclude new competitors from entry. Group boycotts are also utilized to coerce sellers to raise their prices.

In procurement, group boycotts often take the form of a group of competitors refusing to bid or to enter contracts unless prices are raised, or all competitors are offered the same contract terms, or contract terms are made more favorable. Boycotts are usually coercive and involve the threat that if the victim agency does not comply, none of the competitors will do business with it.

Boycotts are usually horizontal, but can be vertical. A buyer may threaten the seller with a refusal to deal unless the seller ceases selling to a competitor. Such cases are usually analyzed under the rule of reason. If a group of horizontal competitor-buyers engages in such an action, the boycott becomes horizontal, and in some instances may be *per se* illegal. *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The *per se* approach applies to cases in which firms with market power boycott suppliers or customers to discourage them from doing business with a competitor. *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F. 2d 313 (6th Cir. 1989). *Per se* treatment has generally been given to joint efforts of competitors to disadvantage a competitor or competitors by pressuring suppliers or customers to deny relationships the competitor or competitors need to compete. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985).

5.9.5.6 Monopolization. When a single firm has such control over a market that it can initiate a price increase without fear of losing any significant amount of business to any competition or it can “force a purchaser to do something he would not do in a competitive market”, it is said to have market power. *Eastman Kodak Co., Inc.*, 504 U.S. at 464 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984)). A firm that possesses and uses market power or has acquired it in some deliberate way that restrains trade, is guilty of monopolization. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). To determine if a monopoly exists, the market must be defined, both by product and by territory. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). What constitutes monopoly power in a product or geographic market depends on the circumstances of each case, including barriers to entry, profit levels, economies of scale, pricing patterns, and product differentiation. *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990); *Metro
Mobile CTS, Inc. v. NewVector Commc'ns Inc., 892 F.2d 62 (9th Cir. 1989); Ball Mem'l. Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986). Ninety percent of a market generally implies monopoly power, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); whereas a market share of less than forty percent generally precludes a finding of monopoly power. United Air Lines v. Austin Travel Corp., 867 F.2d 737 (2d Cir. 1989).

It is not illegal to have a monopoly if it was obtained by a patent, superior product, skill, or historic accident. United States v. Grinnell Corp., 384 U.S. 563 (1966). A monopoly will usually be unlawful if it is obtained by exclusionary tactics. One wrongful way to obtain monopoly power is through predatory pricing, which occurs where a firm prices its products at below-marginal-cost levels to obtain market share and drive out rivals with the intent of later recouping its short term losses through artificially high prices after it has attained monopoly power. Very low bid prices, coupled with an increase in market share, can indicate predatory pricing. On the other hand, it is not unlawful for a business to use one product it sells as a loss leader in order to attract customers to its stores to purchase other products.

Government grants of exclusive franchises and long-term contracts can create monopolies in products or areas. In certain circumstances, however, government officials are immune from antitrust liability. See Sections 5.9.6, 5.9.6.1.


5.9.6 Exemptions. There are both express and implied exemptions from the application of the antitrust laws. For example, human labor is expressly exempted by both state and federal antitrust statutes because it is not considered a commodity or article of commerce. 15 U.S.C. § 17; A.R.S. § 44-1404. In addition, some federal agencies have express authority to regulate and confer antitrust immunity on certain industries. See, e.g., 49 U.S.C. § 10706; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). The "business of insurance" is also exempt under Section 1012 of the McCarran-Ferguson Act. 15 U.S.C. §§ 1011 to 1015.

The courts have implied an exemption for bona fide efforts to influence governmental action when the government is acting as a policy maker. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). This is commonly referred to as the "Noerr-Pennington" doctrine. On the other hand, sham petitioning that is objectively baseless and intended to impair competition is not immune from antitrust scrutiny. Noerr Motor Freight, 365 U.S. at 144. In a very few circumstances, the courts have found a unique professional activity (such as baseball) to be exempt. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).
5.9.6.1 State Action Exceptions and Immunities. The federal antitrust laws do not apply to the anticompetitive conduct of a state acting through its legislature. Parker v. Brown, 317 U.S. 341, 350-51 (1943). This is known as the "state action exemption."

State agencies, officials, and employees are entitled to antitrust immunity if their actions are authorized by state law, even if suppression of competition is the foreseeable result of what the State is authorizing. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 373 (1991). See also Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (indicating that for immunity purposes, a state agency is equivalent to a municipality, and not the legislature itself). If a state agency denies a license because the applicant has not met a regulatory requirement, for example, the agency may be engaging in anticompetitive conduct. However, if the regulation is authorized by statute and suppression of competition is a foreseeable result of the statute that authorized the regulation, the conduct is exempt from the antitrust laws.

The state action exemption does not permit a state to authorize or approve -- and thus immunize -- the anticompetitive conduct of private parties who violate the antitrust laws. Parker, 317 U.S. at 351. Moreover, it does not provide immunity to state officials who participate in a purely private agreement or conspiracy in restraint of trade where the "State acts not in a regulatory capacity but as a commercial participant in a given market." Omni Outdoor Advertising, Inc., 496 U.S. at 374-375. Only true "state action" is immunized.

Where state statutes permit private parties to set prices, the State action exemption is not available unless the State actively supervises the private parties to ensure that the price-setting activity is reasonable. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The Supreme Court clarified the active supervision element of the test with respect to private actors in FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992). Under Ticor, private actors will not be granted immunity under a regulatory scheme unless the State has actively exercised its power to regulate the activity.

Unilateral governmental action may be immune from antitrust liability, even if it does not meet the state action exemption tests. No violation of the Sherman Act occurs if a governmental entity imposes an anticompetitive measure on the private sector, such as a rent stabilizing ordinance, because there is no concert of action and therefore no conspiracy. Fisher v. City of Berkeley, 475 U.S. 260, 270 (1986).

5.9.7 Enforcement of Antitrust Laws. In Arizona, the Attorney General, or a county attorney with the permission of the Attorney General, may enforce the Uniform State Antitrust Act. A.R.S. § 44-1407. Both the Attorney General and the County Attorney can prosecute the bid-rigging statutes criminally (A.R.S. §§ 34-252, -258), seek civil penalties (A.R.S. § 34-254), and recover for the State and its entities (A.R.S. § 41-192). Private parties may also enforce the law by bringing suit for damages or injunctive relief against alleged violators. A.R.S. § 44-1408(B). See Sections 5.9.3.1, 5.9.3.2, 5.9.4.1.

5.9.8 Detecting Antitrust Violations in Bidding. The bidding process is a fertile field for anticompetitive conduct. Procurement personnel risk being implicated in an anticompetitive combination if a vendor seeks direct influence in writing the specifications, seeks removal of a competitor from a vendor list, seeks inside information about competitors' bids before a bid award, asks about competitors' prices, seeks special treatment where considerations other than price are factors in bid awards, or seeks modifications to the contract after the bid is awarded.

If a procurement officer gives a vendor special treatment or inside information or accepts gifts or favors from the vendor, the officer may have entered into a conspiracy in restraint of trade. Even the appearance of special treatment, by repeated contact and communications with a single vendor during the bidding process, can create the appearance to the losing bidder that collusion has occurred. Although not an antitrust problem, avoiding this appearance can reduce bid protests.

In addition to resisting vendor influence, procurement officers can do much to enhance competition, for example, by writing specifications so that the largest number of firms qualify to bid and maintaining long vendor lists. In addition, avoiding brand-specific specifications and not requiring terms that only large firms can meet will open the market place to new and smaller firms. Bidding contracts, even when not required by the Procurement Code, may also enhance competition.

The first level of detection of antitrust violations, therefore, is an internal one. Government officers engaged in procurement should police themselves to avoid even a hint of special favors or too-close associations with vendors. And procurement personnel should endeavor to promote competition through their policies and practices.

The second level of detection involves identifying the signs of collusion or other unlawful anticompetitive conduct among bidders. Procurement officers are in a unique position to detect suspicious bidding patterns indicating anticompetitive practices. If any of the following is observed, the procurement officer should alert the Antitrust Unit of the Attorney General's Office immediately. The Attorney General's Office can then investigate and take appropriate action to prevent threatened illegality or to remedy anticompetitive conduct that has already taken place.
5.9.8.1 Identical Bids. Identical bids submitted by competitors can indicate a possible illegal trade restraint. Although identical bids do not always indicate unlawful 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. See Sections 5.9.5.1. Public officials should note when vendors change from competitive prices to identical prices and be alert to references to "association" or "industry" prices.

5.9.8.2 Simultaneous Price Increases and Price Maintenance. A procurement officer should 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 may also 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 itself unable to procure the 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.

5.9.8.3 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 is incompatible with normal free market operation and should alert the purchaser to possible collusion.

Bid rotation between general and subcontractors also occurs. 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 bid rigging is occurring. Rotation according to contract size is another danger signal. Bid rigging has occurred where designated vendors or contractors are awarded contracts valued at an amount in excess of a certain figure, while others are awarded the contracts valued below the figure.

5.9.8.4 Customer Allocation. The unlawful allocation of customers is another technique used for bid rigging. 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.
5.9.8.5 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 become acquainted 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.

5.9.8.6 Other Suspicious Bidding Practices. Other antitrust violations can be detected just by being alert. For example, procurement officers should watch for sudden changes in bidding conditions. If a group of vendors or contractors suddenly eliminates or cuts back the period of warranty or the discount on the objects installed or sold, a conspiracy may have prompted the action. Finally, purchasing agents at all levels of government should maintain a well-established network of communications with each other.

5.9.9 Application of the Antitrust Laws to State Employees Engaged in Purchasing. The antitrust laws apply to all "person[s]," a term defined in A.R.S. § 44-1401. A.R.S. § 44-1403. State procurement personnel are not necessarily immune from antitrust liability by virtue of the fact they are employees of the State. See Section 5.9.6.1.

To avoid antitrust claims or accusations, procurement personnel should remain independent from vendors and their representatives. See Section 5.9.8. Those who buy and sell on behalf of the State should make their decisions on the basis of their independent analysis of the products and services needed, with a view toward maximizing competition among those who supply them.

5.9.10 Antitrust Attorney's Fees. The prevailing party in an antitrust case is entitled to recover reasonable attorney's fees and costs under both state and federal law. 15 U.S.C. § 15(a); A.R.S. § 44-1408.

Section 15(a) of the Clayton Act permits attorney's fees incidental to the statutory right of damages and thus, fees are not available in actions seeking only injunctive relief. *Twin Cities SportService v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1314 (9th Cir. 1982). An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory. *Id.* at 1312. Under Arizona antitrust laws, however, a prevailing party in both an action for damages and for injunctive relief is entitled to attorney's fees. A.R.S. § 44-1408.
A prevailing antitrust plaintiff is entitled to recover reasonable attorney’s fees for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect the client's pursuit of antitrust damages. *Twin Cities Sportservice*, 676 F.2d at 1313. Generally, the starting place for determining a reasonable award is to calculate the lodestar figure: the product of reasonable hours times a reasonable hourly rate. *See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1423 (11th Cir. 1987).

If an antitrust settlement results in a common fund for the benefit of a plaintiff class, a court may exercise its equitable powers to award attorney’s fees pursuant to the common fund doctrine. *Florida v. Dunne*, 915 F.2d 542, 544-55 (9th Cir. 1990). Under this doctrine, fees may be calculated on a lodestar or percentage of the fund basis, provided the fees are reasonable under the circumstances. *Id. at 545*. Twenty-five percent of the recovery is the benchmark where fees are calculated by using the percentage of the fund method. *Paul, Johnston, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Morganstein v. Esber*, 768 F. Supp. 725, 726 (C.D. Cal. 1991). The percentage can then be adjusted upward or downward to account for any unusual circumstances involved in the case. *Graulty*, 886 F.2d at 272-73.
CHAPTER 6
PUBLIC RECORDS

Table of Contents

Section 6.1  Scope of this Chapter

Section 6.2  Scope of Public Records Requirements
   6.2.1  Arizona’s Policy of Public Disclosure
   6.2.1.1  What Is a Public Record?
   6.2.1.2  Persons Subject to the Public Records Law

Section 6.3  Types of Public Records

Section 6.4  Denying Public Inspection
   6.4.1  Records Confidential by Statute
   6.4.2  Records Involving Privacy Interests
   6.4.3  Restricting Access to Records Based Upon the Best Interests of the State
   6.4.4  Requests by Litigants

Section 6.5  Procedure for Handling Requests for Access to Public Records or Other Matters
   6.5.1  Inspection and Copying of Public Records
   6.5.2  Ongoing Requests
   6.5.3  Duty to Redact
   6.5.4  Charges for Copies
   6.5.5  Non-Commercial Use
   6.5.6  Commercial Use
   6.5.7  Free Copies

Revised 2011
Section 6.6  Consequences of Wrongful Refusal to Disclose
  6.6.1  Attorney’s Fees
  6.6.2  Damages

Section 6.7  Preservation, Maintenance, Reproduction, and Disposition of Public Records
  6.7.1  Preservation and Maintenance Generally
  6.7.2  Quality and Storage Requirements
  6.7.3  Size Requirements
  6.7.4  Reproduction of Public Records
  6.7.5  Disposition of Public Records

Appendix 6.1  Records Made Confidential/Non-Disclosable by Arizona Statute (numerical order by title/statute)

Appendix 6.2  Records Made Confidential/Non-Disclosable by Arizona Statute (alphabetical order by subject matter)
CHAPTER 6
PUBLIC RECORDS

6.1 Scope of this Chapter. This Chapter presents guidelines for agencies to use in determining which documents are subject to public scrutiny under the Arizona Public Records Law, A.R.S. §§ 39-101 to -161, and discusses the procedure for handling requests for access to public records. It also discusses the preservation and disposition of records.

6.2 Scope of Public Records Requirements.

6.2.1 Arizona’s Policy of Public Disclosure. The general policy of this State with respect to public inspection of governmental records is set forth in A.R.S. § 39-121: "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." This public records statute seeks to increase public access to government information and to make government agencies accountable to the public. However, some public records are confidential and should not be disclosed to the public. See Section 6.4 infra.

6.2.1.1 What Is a Public Record? As a general rule, "all records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records." Carlson v. Pima County, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). Section 39-121.01(B) requires that all officers and public bodies maintain records, including records defined in A.R.S. § 41-151.18, that are reasonably necessary to provide an accurate accounting of their official activities and government-funded activities. "Records" are defined in A.R.S. § 41-141.18 as follows:

all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media pursuant to § 41-1348, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein.

In addition, A.R.S. § 39-121 requires public officers to disclose "other matters." "Other matters subject to the public’s right of access include ‘documents which are not required by law to be filed as public records. . . .’" Salt River Pima-Maricopa Indian Cmty. v. Rogers 168 Ariz. 531, 539, 815 P.2d 900, 908 (1991). "Other matters" include documents held by the public officer in his or her official capacity and in which the
public's interest in disclosure outweighs the governmental interest in confidentiality. Id. "Because the language of A.R.S. § 39-121.01.B is so broad, [the Arizona Supreme] Court has abandoned any ‘technical distinction’ between public records and other matters." Griffis v. Pinal County, 215 Ariz. 1, 4 n.5, 156 P.3d 418, 421 n.5 (2007) (quoting Carlson, 141 Ariz. at 490, 687 P.2d at 1245). Although most documents in a public officer’s possession are public records, documents that relate solely to personal matters and have no relation to official duties are not public records even if a public officer or agency possesses them or uses public funds to create them. Id. at 4, ¶ 11, 156 P.3d at 421 (recognizing that e-mails on a county-owned computer system may be purely personal and not subject to disclosure under the Public Records Law).

For examples of documents that have been found to be "public records" and "other matters," see Section 6.3 infra. A custodian of public records may be justified in not disclosing some public records (see Section 6.4 infra) but this determination does not change their character as a public record.

6.2.1.2 Persons Subject to the Public Records Law. The Public Records Law applies to "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." A.R.S. § 39-121.01(A)(1). Public body is defined as "this state, any county, city, town, school district, political subdivision or tax-supported district in this 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 monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state." Id. § (A)(2). This definition differs from and is more inclusive than the term "public body" defined in the State's Open Meeting Law. A.R.S. § 38-431(6). See, e.g., Ariz. Att'y Gen. Op. I95-010 (both Public Records Law and Open Meeting Law apply to charter schools but a different analysis applies); Ariz. Att'y Gen. Op. I85-101 (for public records purposes, the county public defender is a public official and therefore records made or received by that office are records of the State subject to the requirements discussed in this Chapter). By definition, the employees of public officers and public bodies are also bound by the Public Records Law.

Arizona courts are not subject to Arizona’s public records laws. Arizona Supreme Court Rule 123 governs the maintenance and disclosure of judicial records.

6.3 Types of Public Records. The following are examples of some of the types of documents that have been found to be "public records and other matters" and thus are available upon request to the public except for any portions of documents that may be protected from disclosure (discussed in Section 6.5.3 infra):

2. Documents indicating the number of applicants for personnel positions by race and national origin, where no personal identification of the applicant is sought, Ariz. Att'y Gen. Op. I80-044;


10. A county sheriff's "offense report" of an assault by a prisoner in the county jail, *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246;


15. Notice of claim that high school student's attorney filed with the school district, *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 17, 159 P.3d 578, 582 (App. 2007);
16. Disciplinary records of public employees, including the employee responses to disciplinary actions, A.R.S. § 39-128(A);

17. E-mail communications and computer backup tapes containing all documents for a county attorney’s office may be public records, *Star Publ’g Co. v. Pima County Attorney’s Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App. 1994) (County failed to provide specific factual basis to support argument that records were protected from disclosure);

18. A public record “maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata,” *Lake v. City of Phoenix*, 222 Ariz. 547, 551, ¶ 12, 218 P.3d 1004, 1008 (2009);

19. Videotapes held by the Yuma County Police Department, *KPNX-TV v. Superior Court*, 183 Ariz. 589, 592-93, 905 P.2d 598, 601-02 (App. 1995) (but holding that the State properly withheld disclosure of one of two videotapes because of safety and security concerns).

**6.4 Denying Public Inspection.** The custodian of public records must deny inspection when the record is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (App. 1985). Although there is a presumption in favor of access to public records, this presumption may be outweighed by legitimate government considerations of privacy and the best interests of the State. *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9, 955 P.2d 534, 537 (1998). If the custodian of public records determines that these interests outweigh the public’s right of inspection, he or she may refuse to disclose the records but if challenged, he or she has the burden of overcoming the presumption in favor of disclosure. *Id.* A public body or public officer may seek a declaratory judgment in cases in which it is unclear whether or not disclosure is appropriate. See *Arpaio v. Citizens Publ’g Co.*, 221 Ariz. 130, 211 P.3d 8 (App. 2008).

**6.4.1 Records Confidential by Statute.** There are over 300 Arizona statutes that address the confidentiality of records. A comprehensive list of the Arizona statutes that may require that all or a portion of governmental records be protected from public disclosure is included at the end of this chapter in Appendix 6.1. Please note that this list is current as of the date this chapter was last updated. Arizona rules may also limit disclosure of certain information. See, e.g., A.A.C. R2-5-105 (limiting public access to information in personnel files to the following: name of employee; date of employment; current and previous class title; name and location of current and previous agencies to which the employee has been assigned; current and previous salaries and dates of each change; name of employee’s current or last known supervisor). In addition, federal law may require confidential treatment of certain information. See, e.g., 42 U.S.C. § 405(c)(2)(C)((viii)(I) (prohibiting disclosure of social security numbers to unauthorized persons). Public officials and employees should review the confidentiality
provisions that affect their areas of responsibility to avoid disclosure of confidential information.

6.4.2 Records Involving Privacy Interests. The Arizona courts have long recognized personal privacy as an exception to the general rule requiring access to government records. See Scottsdale Unified Sch. Dist., 191 Ariz. at 300, ¶ 9, 955 P.2d at 537; Carlson, 141 Ariz. at 490-91, 687 P.2d at 1245-46. Under this exception, the custodian has discretion to deny public inspection when the disclosure would invade privacy and that invasion outweighs the public's right to know. See id. “In balancing considerations such as privacy against the general public interest in disclosure, it is relevant to examine whether the information in question is available through alternative means.” A.H. Belo Corp v. Mesa Police Dep’t, 202 Ariz. 184,186, ¶ 6, 42 P.3d 615, 617 (App. 2002) (holding that the city appropriately refused to disclose the audiotape of a 911 call in light of the family’s privacy interests because the city disclosed the transcript, which was all that was necessary to inform the citizens about the government’s actions).

Privacy is not defined under the Public Records Law. The Arizona Supreme Court relied on the United States Supreme Court’s definition of privacy under the federal Freedom of Information Act in finding that "information is 'private if it is intended for or restricted to the use of a particular person or group or class of persons:  not freely available to the public'” and "the privacy interest encompasses 'the individual's control of information concerning his or her person.'" Scottsdale Unified Sch. Dist., 191 Ariz. at 301, ¶ 14, 955 P.2d at 538-39. State employees have a privacy interest in their home addresses and phone numbers. Ariz. Att'y Gen. Op. I91-004. Although autopsy reports are subject to the Public Records Law, the privacy interests of survivors “must be weighed against the need for public awareness of the government’s performance of its law enforcement functions” to determine if some of the records are not appropriately subject to public inspection. Schoeneweis, 223 Ariz. at 175-76 ¶ 23, 221 P.3d at 54-55. The "records of the Industrial Commission’s proceedings, orders and awards" are public but "information which is not collected to serve as a memorial of an official transaction or for the dissemination of information is private . . ." Industrial Comm’n, 97 Ariz. at 126, 397 P.2d at 627. The public’s right to know generally outweighs the privacy concerns of a convicted offender. Mitchell v. Superior Court, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

When a government entity withholds documents generated or maintained on a government-owned computer system on the grounds that the documents are personal, the requesting party may ask the trial court to perform an in camera inspection to determine whether the documents are public records. Griffis, 215 Ariz. at 5, ¶ 16, 156 P.3d at 422.
6.4.3 Restricting Access to Records Based Upon the Best Interests of the State. The Arizona Supreme Court has also recognized that an officer or custodian of public records may refuse inspection of public records to protect the best interests of the State where "inspection might lead to substantial and irreparable private or public harm." Carlson, 141 Ariz. at 491, 687 P.2d at 1246.

As early as 1952, the Arizona Supreme Court recognized an exception to public disclosure 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 "release of information would have an important and harmful effect on the duties of the officials or agency in question." Board of Regents, 167 Ariz. at 257-58, 806 P.2d at 351-52. 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. Id., 167 Ariz. at 258, 806 P.2d at 352. When a public officer determines that the harm to the State outweighs the public right to disclosure of a document, he has the burden of specifically demonstrating the harm if his decision is challenged in superior court. Cox Ariz. Publ'n, Inc. v. Collins, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

Applying the balancing test in Board of Regents, the Arizona Supreme Court held that the public's interest in ensuring the State's ability to secure the most qualified candidate for university president is more compelling than its interest in knowing the names of all of the "prospects" for the position. Board of Regents, 167 Ariz. at 258, 806 P.2d at 352. When a "prospect" is seriously considered and interviewed, the "prospect" becomes a candidate. The court held that the public's interest in knowing which candidates are being considered for the job outweighs "countervailing interests of confidentiality, privacy and the best interests of the state." Id. (quoting Carlson, 141 Ariz. at 491, 687 P.2d at 1246); see also Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 351, ¶ 33, 35 P.3d 105, 112 (App. 2001) (superior court did not abuse its discretion in ordering the State to disclose most of the test questions in a statewide academic test that students must pass to graduate from high school because the public interest in disclosure outweighed “the State's cost and inconvenience in remedying that disclosure”); KPNX-TV, 183 Ariz. at 593, 905 P.2d at 602 (State was justified in withholding surveillance camera videotape due to its "security concerns about public disclosure of a videotape showing undercover officers, the evidence locker, and the location of the surveillance camera").

A public officer or public body may refuse to disclose documents that contain information protected by a common law privilege where release of the documents would be harmful to the best interests of the State. See, e.g., the informant's privilege, Grimm v. Ariz. Bd. of Pardons & Paroles, 115 Ariz. 260, 268-69, 564 P.2d 1227, 1235-36 (1977) (recognizing the "informant's privilege which, with certain exceptions, protects the identity of the informant but not generally the contents of the communication"); State v. Celaya, 27 Ariz. App. 564, 567, 556 P.2d 1167, 1170 (1976) (“The state may withhold
from disclosure the identity of persons who furnish information of violations of law to law enforcement officers in furtherance of the public interest in effective law enforcement”); and the deliberative process privilege, Grimm, 115 Ariz. at 269, 564 P.2d at 1236 (agreeing with the reasoning in United States v. Morgan, 313 U.S. 409 (1941) and holding that the mental processes of an administrative decision-maker were protected from disclosure including the manner and extent of his study of the administrative record and his consultation with subordinates); but see Rigel Corp. v. State, 225 Ariz. 65, 73 ¶ 41, 234 P.3d 633, 641 (App. 2010) (declining to create a deliberative process privilege by decisional law).

The cloak of confidentiality may not be used, however, to save an officer or public body from inconvenience or embarrassment. Dunwell v. Univ. of Ariz., 134 Ariz. 504, 508, 657 P.2d 917, 921 (App. 1982); Ariz. Att'y Gen. Op. 76-43. Nor may officials deny access simply because the records might be used to establish tort liability on the part of the State. Ariz. Att'y Gen. Op. 89-022. And “[t]he promise of confidentiality standing alone is not sufficient to preclude disclosure.” Moorehead, 130 Ariz. at 505, 637 P.2d at 307.

6.4.4 Requests by Litigants. The foregoing guidelines on refusing public inspection may not apply 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, 115 Ariz. at 269, 564 P.2d at 1235. If a party to litigation against the State requests records under the Public Records Law, the party need not demonstrate that the "documents are relevant to anything" and therefore may obtain records that would not be discoverable in litigation. Bolm v. Custodian of Records of Tucson Police Dep't, 193 Ariz. 35, 39, ¶ 10, 969 P.2d 200, 204 (App. 1998). However, if the State or other public entity refuses to disclose a document to a litigant who requests it under the public records law, the court balances the government’s interest in nondisclosure with the public’s, not the litigant’s, interest in disclosure. Cf. London v. Broderick, 206 Ariz. 490, 495, ¶ 17, 80 P.3d 769, 774 (2003) (holding that the government employer’s interest in not disclosing its investigatory file before a pre-disciplinary interview outweighed the public’s interest in “disclosure of the preliminary investigation of a low-level probation department employee at the initial stage of the investigation”).

6.5 Procedure for Handling Requests for Access to Public Records or Other Matters.

6.5.1 Inspection and Copying of Public Records. The right to inspect documents is not unqualified. See A.R.S. § 39-121.01(D)(1) (“Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office hours.”) Records may not be inspected at such times and in such manner as to disrupt public business. See Ariz. Att’y Gen. Ops. 180-097, 78-234, 70-1. Records must be provided if they are in the custody of the public officer or public body, even if they are also available elsewhere. Phoenix New Times, L.L.C. v. Arpaio, 217 Ariz. 533, 540, ¶ 22, 177 P.3d 275, 282 (App. 2008).
The custodian of public records must promptly respond to record requests and promptly furnish records that are subject to disclosure or access will be deemed denied. A.R.S. § 39-121.01(D)(1), (E). “‘Prompt,’ . . . mean[s] ‘quick to act or to do what is required,’ or ‘done, spoken, etc. at once or without delay.’” W. Valley View, Inc. v. Maricopa County Sheriff’s Office, 216 Ariz. 225, 230, ¶ 21, 165 P.3d 203, 208 (App. 2007) (quoting Webster’s New World Dictionary 1137 (2d ed. 1980)). In Phoenix New Times, the Arizona Court of Appeals found that the Maricopa County Sheriff’s Office had wrongfully denied records requests because it had delayed in providing the requested documents and failed to offer a legally sufficient reason for the delay. Phoenix New Times, 217 Ariz. at 547, ¶ 49, 177 P.3d at 289.

The governmental entity has the burden in proving that its response to records request was prompt in light of the circumstances surrounding each request. Id. at 538-39, ¶ 15, 177 P.3d at 280-81. Promptness must in all cases be a factual determination, depending upon the accessibility and volume of the material. If the information requested is on microfilm and thus requires use of a reader/printer to view it, the time for inspection would 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. Similarly, if the requested material contains confidential information that must be redacted, the custodian should inform the requesting party that the response will be delayed and the reason for the delay.

If the custodian of the record does not have the facilities for making copies, the person requesting the record must be granted access to it for the purpose of making copies. See A.R.S. § 39-121.01(D)(2). However, the copies must be made while the document remains in the possession, custody, and control of the custodian. Id. The person requesting the record may request that the custodian mail a copy of any public record not otherwise available on the public body’s web site, but the custodian may require the requester to pay copying and postage charges in advance. A.R.S. § 39-121.01(D)(1).

6.5.2 Ongoing Requests. In W. Valley View, Inc., 216 Ariz. at 228, ¶ 14, 165 P.3d at 206, the Arizona Court of Appeals held that the sheriff’s office must comply with a newspaper’s ongoing public records request for copies of its press releases. The court found the request justified because the request only sought copies of “a single easily defined and identifiable category of documents that the public agency admittedly regularly generates”; the newspaper needed to receive timely press releases to meet its deadlines; and the sheriff’s office provided timely press releases to many other media outlets. Id. at 229, ¶ 14, 230, ¶ 19.

6.5.3 Duty to Redact. When confidential and public information are commingled in a single document, a copy of the document may be made available for public inspection with the confidential material excised. Carlson, 141 Ariz. at 491, 687
P.2d at 1246; see also KPNX-TV, 183 Ariz. at 594, 905 P.2d at 603 (custodian must demonstrate specific reasons and a good faith basis for denying access to entire record rather than redacting confidential portions). If confidential material has been attached to an otherwise disclosable document, the material so attached may simply be removed. See id.; Ariz. Att'y Gen. Ops. I86-090, I85-097. The public body should note in its records precisely which material has been excised and which has been released.

If requested, the custodian of the records of an agency (as prescribed under A.R.S. § 41-1001) shall also furnish an index of records or categories of records that have been withheld and state the reasons that each record has been withheld. A.R.S. § 39-121.01(D)(2). “The custodian shall not include in the index information that is expressly made privileged or confidential in statute or a court order.” Id. Records may be grouped by categories for the purposes of this index. Id. The Department of Public Safety, the Motor Vehicle Division of the Department of Transportation, the Department of Juvenile Corrections, and the Department of Corrections are specifically exempt from this indexing requirement. Id.

6.5.4 Charges for Copies. The Legislature has distinguished between the fees an agency may impose for commercial and non-commercial requests for copies of public records. A.R.S. §§ 39-121.01(D)(1), -121.03(A); see also Section 6.5.6. The custodian may require the person requesting the public record to pay in advance for any copying and postage charges. A.R.S. § 39-121.01. If records are available on the web site, the public body or public officer may direct the requestor to obtain copies there. A.R.S. § 39-121.01(D)(1).

6.5.5 Non-Commercial Use. A person requesting copies, printouts, digital copies, 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 6.5.7 infra. 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 for costs of searching for the records. A.R.S. § 39-121.01(D)(1); Hanania v. City of Tucson, 128 Ariz. 135, 136, 624 P.2d 332, 333 (App. 1980); Ariz. Att'y 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.

6.5.6 Commercial Use. Persons requesting reproductions for a commercial purpose must provide a statement setting forth the commercial purpose for which the records are requested. A.R.S. § 39-121.03(A).

Commercial purpose is defined as follows:

[T]he 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 public records for the purpose of solicitation or the sale of 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 the public record. Commercial purpose does not mean the use of a public record as evidence or as research for evidence in an action in any judicial or quasi-judicial body.

A.R.S. § 39-121.03(D).

Commercial uses include: 1) use of the public records for sale or resale; 2) obtaining names and addresses from public records for the purposes of solicitation; and 3) the sale of names and addresses to another for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record. Primary Consultants, LLC v. Maricopa County Recorder, 210 Ariz. 393, 400, 111 P.3d 435, 442 (App. 2005). The use of public records for one’s trade or business is not a commercial purpose. Id. at 400, ¶ 28, 111 P.3d at 442. Gathering newsworthy facts from public records to include in a newspaper or other publication is not a commercial purpose. Parks, 178 Ariz. at 605, 875 P.2d at 838.

Upon being furnished a signed statement of the commercial purpose, the custodian may assess a charge that includes the following:

1. A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.

2. A reasonable fee for the cost of time, materials, equipment and personnel [used] in producing such reproduction.

3. The value of the reproduction on the commercial market as best determined by the public body.

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 1) the time expended in retrieving the records; 2) transportation costs, if any; and 3) the actual cost to the public body in terms of special equipment or processing required in preparing the record for release.

If the custodian of a public record determines that the [requester’s] commercial purpose . . . is a misuse of public records or is an abuse of the right to receive public records, the custodian may apply to the [G]overnor requesting that the [G]overnor by executive order prohibit the furnishing of copies, printouts or photographs for such commercial purpose. Id. § (B).
6.5.7 Free Copies. Certain public records must be provided without charge, namely those concerning "a claim for a pension, allotment, allowance, compensation, insurance or other benefits which [are] to be presented to the United States or a bureau or department thereof." A.R.S. § 39-122(A). Victims of certain crimes also have rights to obtain copies of some records at no cost. A.R.S. § 39-127.

6.6 Consequences of Wrongful Refusal to Disclose.

6.6.1 Attorney's Fees. A court may award legal costs, including attorney's fees, to the requester if he or she substantially prevails. A.R.S. § 39-121.02(B). This does not limit the rights of any party to recover attorney's fees, expenses, and double damages that are authorized by other statutes. Id.

6.6.2 Damages. A public officer or agency may also be liable for damages that result from wrongfully denying a person access to public records. A.R.S. § 39-121.02(C).

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 or employees of this state . . . or the counties and incorporated cities and towns of this state . . . in the course of their public duties are the property of the state." A.R.S. § 41-151.15(A). Each public body and officer is responsible for preserving, maintaining, and caring for the public records within their offices. A.R.S. § 39-121.01(C). Each officer and public body is required by statute to carefully secure, protect, and preserve public records from deterioration, mutilation, loss, or destruction, unless the records are disposed of pursuant to A.R.S. §§ 41-151.15 and 151.19. See A.R.S. § 39-121.01(C); see also Section 6.7.5 infra.

The head of each state agency must perform the following duties:

1. Establish and maintain an active, continuing program for the economical and efficient management of the public records of the agency.

2. Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the rights of the state and of persons directly affected by the agency's activities.

3. Submit to the director [of the Arizona State Library, Archives and Public Records], in accordance with established standards, schedules proposing the length of time each record series warrants
retention for administrative, legal or fiscal purposes after it has been received by the agency.

4. 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.

5. Once every five years submit to the director lists of all essential public records in the custody of the agency.

6. Cooperate with the director in the conduct of surveys.

7. Designate an individual within the agency to manage the records management program of the agency. The agency shall reconfirm the identity of this individual to the state library every other year. The designated individual:

   (a) Must be at a level of management sufficient to direct the records management program in an efficient and effective manner.

   (b) Shall act as coordinator and liaison for the agency with the state library.

8. Comply with rules, standards and procedures adopted by the director.

A.R.S. § 41-151.14(A). Governing bodies of counties, cities, towns, and other political subdivisions and the heads of political subdivisions are also required, as far as practicable, to follow the program established for the management of state records. A.R.S. § 41-151.14(B). If the head of a state or local agency fails to comply with these requirements, they are guilty of a class 2 misdemeanor. A.R.S. § 41-151.14(C).

The Director of the State Library, Archives and Public Records is responsible for (a) establishing “standards, procedures, and techniques for effective management of public records,” A.R.S. § 41-151.112(A)(1), and (b) establishing standards and procedures for preparing schedules for retaining records of continuing value and promptly and efficiently disposing of records “no longer possessing sufficient administrative, legal, fiscal, research or historical value” to warrant their retention, id. § (A)(3). The Director of the State Library, Archives and Public Records is also responsible for the preservation and management of records and for authorizing the destruction or disposal of records. A.R.S. §§ 41-151.12(A), -151.15, and -151.19. Additional information regarding the standards and procedures currently established by the Director of the State Library, Archives and Public Records is available on that entity’s website.
6.7.2 Quality and Storage Requirements. All permanent public records must 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 Arizona state library, archives and public records." A.R.S. § 39-101(A). These public records must also be stored and maintained according to the Director's standards. Id. § (B). A public officer who fails to keep permanent public records in accordance with the Director's standards is guilty of a class 2 misdemeanor. Id. § (C).

6.7.3 Size Requirements. All public records must conform to the standard letter size of eight and one-half inches by eleven inches, within standard paper manufacturing tolerances, unless they are "engineering drawings, architectural drawings, maps, computer generated printout, output from test measurement and diagnostic equipment, machine generated paper tapes," or 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 Arizona State Library, Archives and Public Records may exempt documents 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 this state." Id.

6.7.4 Reproduction of Public Records. Each state agency may implement a program for the reproduction by photography or other method of reproduction on film, microfiche, digital imaging, or other electronic media of records in its custody. A.R.S. § 41-151.16(A). However, prior to instituting the program, the agency must obtain approval from the Director of the Arizona State Library, Archives and Public Records. Id.

6.7.5 Disposition of Public Records. The disposition of public records by the State or any of its political subdivisions is governed by A.R.S. §§ 41-151.15, -151.17, -151.19, and 44-7601. A State agency may destroy records when the State Library concludes "that the record has no further administrative, legal, fiscal, research or historical value." A.R.S. § 41-151.15(B). The agency may obtain approval to destroy records from the Records Management Division of the State Library on a continuing basis pursuant to a records retention and disposition schedule or, for records not on a retention schedule, pursuant to single request form. A report of records destruction that includes a list of all records disposed of shall be filed at least annually with the State Library on a form prescribed by the State Library. A.R.S. § 41-151.19. The forms are available on the State Library website.

A public officer or other person having custody or possession of any record for any purpose, "who steals, or knowingly and without lawful authority destroys, mutilates, defaces, alters, falsifies, removes or sequesters" all or part of a public record, or who permits any other person to do so, is guilty of a class 4 felony. A.R.S. § 38-421; see also A.R.S. § 13-2407 (making it a class 6 felony to tamper with a public record). See Section 2.15(3), (19), (22).
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Agriculture
Laboratory Test Results § 3-145(D)
Fertilizer Materials, annual reports and publications, information concerning an individual’s operations § 3-266(A)
Pesticides, trade secrets, commercial or financial information § 3-351(H)
Pesticides Control § 3-374
Marketing Orders and Agreements, individual totals of affected commodities produced or shipped § 3-407(C)
Marketing Orders and Marketing Agreements, election procedures § 3-410(E)
Marketing Orders and Marketing Agreements, terminating a marketing order § 3-412(I)
Marketing Orders and Agreements, records and reports § 3-422(C)
Citrus Fruit Standardization, totals of commodities produced or shipped § 3-449.03(B)
Citrus Fruit Standardization, exemption from, information provided by shippers to the supervisor § 3-450(G)
Fruit and Vegetable Standardization, individual totals of commodities produced or shipped § 3-488(A)
Fruit and Vegetable Standardization, exemption from, information provided by shippers to the supervisor § 3-491(G)
Pesticides, trade secrets or commercial or financial information § 3-351(H)
Dairies and dairy products, handlers’ license renewal, financial statements § 3-609(A)(3)
Animal and Bird Feeds, information concerning an individual’s operations § 3-2604(A)(1)
Inspections and Investigations, trade secrets § 3-3121

Alcoholic Beverages
Department of Liquor Licenses and Control, powers and duties § 4-112(F)

State Lottery
Information Maintained by the Commission § 5-504(F)
Contracts, bids received § 5-509(B)
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Banks and Financial Institutions
Banking Department Records § 6-129(A)
Examination, inquiry, or investigation § 6-129(E)
Trust Information, disclosure § 6-860

Children
Adoption, putative father registry § 8-106.01
Adoption, hearing information § 8-115(A)
Adoption, records § 8-120, -121
Adoption, confidential intermediary § 8-134
Adoption, subsidized adoption records § 8-144
Juvenile Court, records § 8-208
Juvenile Court, victim’s rights, victim’s advocate; victim consultation privilege § 8-409
Juvenile Court, victim’s rights, right to privacy § 8-413
Child Welfare, records, foster care review board § 8-519(C)
Child Welfare, foster care, special advocate, information reviewed/acquired § 8-522(F)
Child Welfare, termination of parental rights, hearings § 8-537
Child Welfare, termination of parental rights, records and information § 8-541, -542
Healthy Families Pilot Program, access to records § 8-701(J)
Dependent Children, protective services, examination of clergy prohibited § 8-805(C)
Dependent Children, records and reports § 8-807
Dependent Children, child welfare mediation program § 8-809
Dependent Children, information related to an investigation § 8-811(D)

Corporations and Associations
Records and Reports, interrogatories § 10-1634
Professional corporations, privileged communications § 10-2233

Counties
Board of Supervisors, Power of Board § 11-251
Board of Supervisors, Board Powers, hospitals § 11-254.03(6)
County Recorder, discharge papers of service personnel § 11-465
County Officers, peace officer residential address and telephone numbers § 11-483(A)
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

State Treasurer, disclosure of confidential information; violation; classification; definition § 11-505
Medical examiners, death investigations, criminal identification section of DPS § 11-593(E)

Courts and Civil Proceedings
Special Actions, product liability, product safety analysis or review, trade secrets § 12-687(4)
Arbitrations, witness subpoenas; deposition § 12-1507(H)
Injunction against harassment; petition; venue; fees; notice § 12-1809(C)
Privileged communications, husband and wife § 12-2231;
-2232
Privileged communications, clergyman or priest § 12-2233
Privileged communications, attorney and client § 12-2234
Privileged communications, doctor and patient § 12-2235
Privileged communications, reporter and informant § 12-2237
Privileged communications, mediation process § 12-2238
Health care institution records, subpoena § 12-2282(D)
Medical records, confidentiality § 12-2292;
-2293; -2294
Silent witness or crime stopper program, reporting anonymity § 12-2311
Silent Witness program records § 12-2312
Confidentiality of genetic testing results, disclosure § 12-2802
Genetic testing, public records exception § 12-2804
Arbitration, protective orders § 12-3017(E)

Criminal Code
Imprisonment, identity of executioners § 13-704
Method of infliction of sentence of death; identity of executioners § 13-757(C)
HIV and sexually transmitted disease testing § 13-1415(B)
Organized Crime, investigation of racketeering records § 13-2315
Unauthorized release of proprietary or confidential computer security information § 13-2316.02
Interference with judicial proceedings, disclosure of grand jury testimony or decision § 13-2812
Interference with judicial proceedings, disclosure of indictment, information, or complaint § 13-2813
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Offenses against public order, disclosure or alteration of telephone or telegraph message without authority § 13-2913
Eavesdropping--Communications, opening, reading or publishing sealed letter of another without authority § 13-3003
Eavesdropping--Communications, ex parte order for interception and application § 13-3010;
-3011
Eavesdropping--Communications, surreptitious photographing § 13-3018(B)
Weapons and Explosives, concealed weapon, permit record system § 13-3112(J)
Drug Offenses, possession, use or sale in a drug-free school zone, school records of a student involved § 13-3411(G)
Family Offenses, duty to report non-accidental injury of a minor, medical records, records non-disclosable § 13-3620(G)
Sex Offender Registration, access to records § 13-3823
Entry of clearance on records, arrest/indictment records, cleared of charges; records non-disclosable § 13-4051(B)
Competency and Privileges, examination as a witness, privileged communications § 13-4062
Crime Victim’s Rights, pre-sentence report, victim’s right to view § 13-4410
-4425
Crime victims’ rights, privileged consultation between victim advocate and victim § 13-4430
Crime victims’ rights, victim’s right to privacy § 13-4434
Crime victim’s rights, employee leave records § 13-4439(H)
Incompetence to stand trial, privilege against self-incrimination, records § 13-4508

Revised Arizona Probate Records
Private Fiduciaries, conduct, communications § 14-5651(E)

Education
School districts, financial mismanagement, information and records of the appointed receiver § 15-103(T)
School district over expenditures, information and records of the appointed receiver § 15-107(M)
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Educational records § 15-141
Family Literacy Program § 15-191&
   -191.01, n.,
   Laws, 1994,
   9th, S.S.,
   ch. 1, §9
State Board of Education, construction bids § 15-213
   (A)(2)(d)
School accountability, annual achievement profile § 15-241(C)
School accountability, records kept by State Board of Education § 15-241.01(J)
School District Governing Boards, General powers and duties, bullying § 15-341
   (A)(37)(d)
School District Governing Board, investigation of immoral or unprofessional conduct, records § 15-350
Certification and Employment of Teachers, teacher evaluations § 15-537(G)
Certification and Employment of Teachers, pupil’s name § 15-551
Curriculum, information furnished to the auditor general § 15-715, n.,
   Laws, 1994,
   9th S.S.,
   ch.2, § 30
State Board of Ed and School District Governing Boards,
   Assessment of pupils, non-disclosure of personally identifiable information § 15-741
Test results, annual report § 15-743(A)(3)
Admission Requirements, educational records § 15-828(G)
Student accountability information system, student level data § 15-1042(K)
Student level data, confidentiality § 15-1043
Education database, non-disclosure of personally identifiable information § 15-1045
Arizona Board of Regents, record disclosure § 15-1638
Intellectual property of university, trade secrets § 15-1640
College Savings Plan, program requirements § 15-1875(R)
Fingerprinting of students, post secondary health sciences programs § 15-1881(C)
Authority to enter compact, terms of interstate compact on educational opportunity for military children § 15-1911
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Elections and Electors
Registration Procedures, driver’s license voter registration § 16-112
Registration Forms, voter registration assistance agencies, § 16-140(C)
decision forms
Registration Forms, registration to vote § 16-152
(A)(21)
Registration Forms, justices, court of appeals, municipal courts, § 16-153
superior courts, supreme court justices, voter registration
records
Registration Rolls, causes for cancellation, death record § 16-165(D)
Voting equipment, filing of computer election programs with
the Secretary of State § 16-445(D)

Insurance
Administrative Officers and Procedures, insurer claim files § 20-157.01(B)
Administrative Officers and Procedures, information sharing § 20-158(D)
Insurance Companies, financial analysis ratio and examination § 20-234(C)
Synopses
Insurance producer licensing, sharing of information § 20-299
Rating Organizations, information provided to § 20-364
HIV information § 20-448.01
Unfair Practices and Frauds, genetic testing results § 20-448.02
Fraud Unit, powers, privileged and confidential materials § 20-466(D)
Insurance on Collateral Security, disclosure of expiration date
prohibited § 20-475.01
Insurance Holding Company Systems, contents of statement § 20-481.03
(A)(4)
Insurance Holding Company Systems, records obtained or
disclosed during investigation/examination § 20-481.21
Acquisitions Involving Insurers Not Otherwise Covered; § 20-481.25(c)
anti-competitive considerations
Insurance Administrators, records maintenance, confidentiality § 20-485.03(B)
Reinsurance Intermediaries, basis for refusal to license § 20-486.01
Risk-Based Capital for Insurers, confidentiality § 20-488.07
Standard Valuation Law § 20-510(C)
(2)(g)
Assets and Liabilities, report of acquisitions and dispositions § 20-517(D)
Actuarial Opinion and Memorandum Requirements § 20-696.04(F)
Property and Casualty actuarial opinion requirements;
confidentiality, sharing of information § 20-697.01
Particular Types of Insurers, subscription contracts § 20-826(K)
## Appendix 6.1

### Records Made Confidential/Non-Disclosable by Arizona Statute

(In Order by Title/Statute)

<table>
<thead>
<tr>
<th>Topic</th>
<th>Section Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit Insurers, limitation on insuring powers</td>
<td>§ 20-934(I)</td>
</tr>
<tr>
<td>Evidence of Coverage by Health Care Service Organizations</td>
<td>§ 20-1057(L)</td>
</tr>
<tr>
<td>Captive Insurers, licensing, authority</td>
<td>§ 20-1098.01(F)</td>
</tr>
<tr>
<td>Disability Insurance</td>
<td>§ 20-1342(A)(12)</td>
</tr>
<tr>
<td>Group and Blanket Disability Insurance</td>
<td>§ 20-1402(A)(8)</td>
</tr>
<tr>
<td>Mortgage Guaranty Insurance, reinsurance</td>
<td>§ 20-1557(F)</td>
</tr>
<tr>
<td>Professional Liability Insurance</td>
<td>§ 20-1742(B)</td>
</tr>
<tr>
<td>Automobile Theft, Fire and Arson Reporting Immunity</td>
<td>§ 20-1902(E)</td>
</tr>
<tr>
<td>Information and Privacy Protection, disclosure limitations and conditions</td>
<td>§ 20-2113</td>
</tr>
<tr>
<td>Confidentiality of information</td>
<td>§ 20-1904</td>
</tr>
<tr>
<td>Accountable Health Plans, identity of natural parent</td>
<td>§ 20-2321(C)</td>
</tr>
<tr>
<td>Utilization Review, information concerning customers, patients, or review plans</td>
<td>§ 20-2504(D)</td>
</tr>
<tr>
<td>Utilization Review, confidentiality</td>
<td>§ 20-2509</td>
</tr>
</tbody>
</table>

### Juries

<table>
<thead>
<tr>
<th>Topic</th>
<th>Section Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Persons entitled to be excused from jury service</td>
<td>§ 21-202(B)(1)(c)</td>
</tr>
<tr>
<td>Juror records</td>
<td>§ 21-312</td>
</tr>
<tr>
<td>Grand Juries, non-disclosure of testimony</td>
<td>§ 21-411(B)</td>
</tr>
</tbody>
</table>

### Labor

<table>
<thead>
<tr>
<th>Topic</th>
<th>Section Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial Commission, information sharing</td>
<td>§ 23-107</td>
</tr>
<tr>
<td>Division of Occupational Safety and Health, confidentiality of trade secrets</td>
<td>§ 23-426</td>
</tr>
<tr>
<td>Employee Drug Testing, confidentiality of results, records</td>
<td>§ 23-493.09</td>
</tr>
<tr>
<td>Employment Security, contributions, employer tax reports</td>
<td>§ 23-722(A)</td>
</tr>
<tr>
<td>Employer Reporting, new hires</td>
<td>§ 23-722.01(G)</td>
</tr>
<tr>
<td>Worker’s Compensation, HIV</td>
<td>§ 23-1043.02</td>
</tr>
</tbody>
</table>

### Marital and Domestic Relations

<table>
<thead>
<tr>
<th>Topic</th>
<th>Section Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dissolution, records pertaining to payment of maintenance and support</td>
<td>§ 25-322(E)</td>
</tr>
<tr>
<td>Dissolution; Court of Conciliation, conduct of hearing, confidential communications</td>
<td>§ 25-381.16(D)</td>
</tr>
</tbody>
</table>
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Child Custody and Visitation, victims of domestic violence § 25-439(D)
Financial Institutions Data Match, prohibited disclosure § 25-523
Family Support Duties, pleadings and accompanying documents § 25-638(C)
Jurisdiction, information to be submitted to the court § 25-1039

Minerals, Oil and Gas
Department of Mines and Mineral Resources, Trade secrets § 27-112
State Mine Inspector, restrictions on divulging information by inspectors and employees § 27-127
Lease of state lands for mineral claims, geologic and economic evidence relating to mineral resources § 27-233(B)
Lease of State Lands for Mineral Claims, information relating to mineral appraisals § 27-234 (F),(H)
Lease of State Lands for Mineral Claims, inspections, investigations and audits, tax records and trade secrets § 27-239
Terms of Mineral Exploration Permit § 27-252(A)(8)
Lease of state lands for common variety minerals; trade secrets § 27-274
Operations of Mines, complaint to inspector of dangerous conditions § 27-308
Production and Conservation, records § 27-522(B)
Lease of state lands for oil and gas, trade secrets § 27-571
Geothermal Resources, information and records § 27-653
Mined Land Reclamation, disclosure of information § 27-930
State Mine Inspector, public disclosure of information § 27-1231

Transportation
Records, fees for copies, exemptions § 28-446(E)
Records, release of information prohibited § 28-450
Records, information supplied for commercial purposes § 28-452(C)
Records, peace officers, redaction § 28-454(F)
MVD records, release of personal information § 28-455
Traffic and Vehicle Regulation, accident reports § 28-671
Spaying and neutering of animals fund, information relating to donation application § 28-2422.02
Tax Collection, confidential information § 28-5931(1)
Collection procedures, disclosure of confidential information § 28-5935; 5936

6-21 Revised 2011
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Tax Collection § 28-5937
Public-Private partnerships in transportation, confidentiality and public disclosure § 28-7707
Light rail transit systems, public records, confidentiality § 28-9202

Power
Electric Power Competition, consumer protection, confidentiality § 30-806(D)
Electric Retail Competition Information, confidentiality § 30-808

Prisons and Prisoners
State Prison, prisoners, records of prisoner care and custody § 31-221(C)
Executive Clemency; Paroles, address of victim and victim’s immediate family § 31-412(F)
Psychiatric security review board, confidential information § 31-502

Professions and Occupations
Architects, Assayers, Engineers, Geologists, and Surveyors, registration records, education records, investigation records § 32-129
Architects, Assayers, Engineers, Geologists, and Surveyors, board reports, § 32-147
Cosmetology, confidential education records § 32-576
Certified Public Accountants, letters of concern § 32-741(F)
Certified Public Accountants, confidential information § 32-749(A)
Podiatry (Board of Podiatry Examiners), examination materials and records § 32-825(F)
Podiatry, investigations § 32-852.01
Chiropractors and Chiropractic Board, records § 32-929(C)
Collection Agencies, licensing, contents of financial statement § 32-1022(A)
Dental board, pending complaints and investigations § 32-1207
Dentistry, dental board, examination/investigation/educational records § 32-1209
Dentistry, dental board, investigation and adjudication of complaints, patient records § 32-1263.02 (B),(I)
Board of Funeral Directors and Embalmers, examination, investigation and educational records § 32-1310
Board of Funeral Directors and Embalmers, licensing and regulation, notices filed with the board by prospective new owners § 32-1388(F)
Board of Funeral Directors and Embalmers, cremation, notices filed with the board by prospective new owners § 32-1397(F)
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Board of Medical Examiners, grounds for disciplinary action, duty to report § 32-1451(A)
Board of Medical Examiners, investigation, patient and medical records § 32-1451.01 (C),(E)
Naturopathic Medicine, exam materials and records § 32-1525(I)
Naturopathic Medicine, hospital and medical records § 32-1551.01(E)
Board of Nursing, confidential treatment of chemical dependency § 32-1605.01
Board of Nursing, investigation, patient and medical records § 32-1664 (J),(K)
Dispensing Opticians, investigation and adjudication of complaints § 32-1691.01 (B)
Board of Optometry, investigations, name of complainant and patient records § 32-1744 (A),(N)
Board of Optometry, records § 32-1746
Osteopathic Physicians and Surgeons, grounds for disciplinary action, duty to report § 32-1855
Osteopathic Board, medical malpractice insurance, reports, claims and actions § 32-1855.02
Osteopathic Board, investigations, hospital and patient records § 32-1855.03
Board of Pharmacy, investigations, records § 32-1940
Board of Physical Therapy Examiners, investigation of incompetence/unprofessional conduct, identity of informant § 32-2042(A)
Board of Physical Therapy, complaints filed § 32-2045 (D),(E)
Board of Physical Therapy, reporting violations, immunity § 32-2049(C)
Board of Physical Therapy, rights of consumers, home address and telephone numbers of physical therapists § 32-2051(B)
Psychology Board, investigation of unprofessional conduct or incompetence, identity of informant § 32-2081(C)
Psychology Board, investigation records § 32-2082(E)
Psychologists, regulation, confidential communications § 32-2085
Behavior analysts, confidential communications § 32-2091.13
Real estate, confidentiality of licensee’s residential address § 32-2125.03
Veterinarians, examination and educational records § 32-2214(G)
Veterinarians, committee to investigate violations, confidentiality § 32-2237(G)
Private Investigators, licensee financial statements § 32-2402(C)

6-23 Revised 2011
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Physician Assistants (Joint Board), investigation of incompetence or unprofessional conduct, identity of informant § 32-2551(A)
Physician Assistants (Joint Board), confidential records § 32-2552 (C),(E)
HIV, disclosure § 32-2556
Homeopathic Physicians, licensing, licensee’s home address § 32-2916(B)
Board of Homeopathic Medical Examiners, investigation of incompetence/unprofessional conduct, identity of informant § 32-2934(A)
Board of Homeopathic Medical Examiners, investigation information and records, patient records/medical records § 32-2935 (D),(E),(F)
Private Post-secondary Education, types of disciplinary action § 32-3052(C)
Private Post-secondary Education Board, educational records § 32-3058(D)
Behavioral Health Examiners, program for monitoring licensees who are chemically dependent § 32-3253
Behavioral Health Examiners Board, records § 32-3282(C)
Behavioral Health Examiners Board, privileged communications § 32-3283
Respiratory Care Examiners Board, investigation of incompetence or unprofessional conduct, identity of informant § 32-3553(B)
Respiratory Care Examiners Board, medical records § 32-3553(K)
State Board of Appraisal, confidential records § 32-3609
State Board of Appraisal, disciplinary proceedings § 32-3631 (A)(10)
Personal information maintained by professional boards § 32-3801; -4160
Athletic trainers regulation, pending complaints and investigations § 32-4154
Massage therapy regulation, information provided by informants § 32-4256; -4259

Property
Condominium Management, books and records § 33-1258 (B),(C)
Planned Communities, books and records § 33-1805 (B),(C)

6-24 Revised 2011
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Public Health and Safety
Department of Health Services, power to promulgate rules, confidential records § 36-107
Department of Health Services, chronic disease surveillance system, information collected § 36-133(F)
Department of Health Services, child immunization reporting system, confidentiality § 36-135(E)
Department of Health Services, confidential information § 36-136 (H)(11),(L)
Department of Health Services, home health services, records § 36-160
Health Care Institutions, limitations on disclosure of information § 36-404
Health Care Institutions, health screening services, privileged communications § 36-405.01(D)
Children’s behavioral health programs, fingerprint forms § 36-425(E)
Health Care Institutions, health care utilization committees, utilization review proceedings, records, and materials § 36-441(F)
Health Care Institutions, review of certain health care practices, proceedings, records, and materials § 36-445.01
Health Care Institutions, publication of review results, patient identity § 36-445.03
Health Care Institutions, freestanding urgent health center incident reporting, confidentiality § 36-445.04
Health Care Institutions, licensing, nursing care institution administrators and adult home care managers; investigation, examination, and educational records § 36-446.10
Mental Health Services, patient’s right to privacy § 36-507(2)
Mental Health Services, confidential records § 36-509
Mental Health Services § 36-517.02(C)
Department of Developmental Disabilities, developmentally disabled persons, financial information § 36-562(F)
Department of Developmental Disabilities, confidential records § 36-568.01
Department of Developmental Disabilities, confidential health information § 36-568.02
Maternal and Child Health, newborn screening program for hearing loss and congenital disorders § 36-694(E)
Public Health Control, communicable disease information, disclosure § 36-664
Public Health Control, communicable disease information, order for disclosure § 36-665
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Public Health Control, communicable disease information, violation § 36-666
Public Health Control, communicable disease information, civil penalty § 36-667(A)(2)
Public Health Control, maternal and child health, program records § 36-697(G)
Tuberculosis Control, examination of patient records § 36-714(B)(1)
Public Health Control, tuberculosis control § 36-727
Midwifery, licensing, investigations § 36-756.01(C)
Enhanced Surveillance Reporting, trade secrets § 36-783(E)
Public Health, health emergencies, medical information maintained by health department § 36-790(A)
Child Day Care Programs, day care centers, child care personnel, notarized forms and fingerprints § 36-883.02
Child Day Care Programs, day care group homes, child care personnel, notarized forms and fingerprints § 36-897.03(E)
Child Care Group Homes, information relating to a child, parent or guardian § 36-897.12(B)
Hearing Aid Dispensers, clinical and confidential information § 36-1940.04
Abortion, parental consent proceedings § 36-2152(E)
Abortion Reporting Requirements § 36-2163
Emergency Medical Services, medical records § 36-2220
State Trauma Registry, personally identifiable information § 36-2221(D)
Emergency Medical Services, Information, documents and records relating to § 36-2245(M)
Protection of Minors, infant care review committee, records § 36-2284(C)
Health Care Quality Assurance, records/proceedings § 36-2403
Uniform Controlled Substances Act, regulation of manufacture, distribution, and dispensing, registrants records § 36-2523(C)
Controlled Substances Prescription Monitoring, information relating to § 36-2604
Medical Marijuana Act, non-disclosable address information in on-line registry verification system § 36-2807
Medical Marijuana Act, cardholder identifying information in annual report § 36-2809
Medical Marijuana Act, records kept by health department § 36-2810
AHCCCS, powers and duties of administrator and director, power to prescribe rules relating to privilege and confidentiality § 36-2903(I), (Q)(3)
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

AHCCCS, review committees, records and procedures § 36-2917(C)
AHCCCS, long-term care system, power to promulgate rules § 36-2932(F)
AHCCCS, children’s health insurance program § 36-2986(E)
Shelters for Domestic Violence Victims, personally identifiable information § 36-3005
(A)(3)
Shelters for Domestic Violence Victims, personnel, notarized forms and fingerprint checks § 36-3008(C)
Shelters for Domestic Violence Victims, disclosure of location § 36-3009
Healthcare Directive Registry § 36-3295(B)
Child Fatality Review Team, information and records acquired § 36-3503(D)
Telemedicine, Confidentiality protections § 36-3602
Sexually Violent Persons, detention and commitment requirements § 36-3712(C)

Public Lands
State Land Commissioner, powers and duties § 37-132(B)(4)
Geospatial Data Sharing, critical infrastructure information § 37-178(D)
Sale of State Lands, information contained in participation contract proposals § 37-239(E)
Lease of State Lands, information furnished by lessee § 37-282

Public Officers and Employees
Open Meeting Law, executive session minutes § 38-431.03(B)
Conflict of Interest, prohibited acts, disclosure of information § 38-504(B)
Conflict of Interest, attorney general opinion requests § 38-507
State Contracts, for dental and medical insurance, information provided in executive session to JLBC § 38-658(A)

Public Utilities and Carriers
Public Service Corporations, regulation by Corporation Commission § 40-202(C)(5)
Public Service Corporations, disclosure of information to Corporation Commission § 40-204(C)
Public Utilities, Line Siting Committee, plan information § 40-360.02
Prevention of Child Abuse Fund, Application donation § 41-109

State Government
Executive Officers, Secretary of State and Dep’t of State § 41-132(D)
Department of Library, Archives and Public Records, privacy of user records § 41-151.22

6-27 Revised 2011
### Appendix 6.1

**Records Made Confidential/Non-Disclosable by Arizona Statute**  
*(In Order by Title/Statute)*

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 41-198</td>
<td>Domestic Violence Fatality Review Teams, information acquired by</td>
</tr>
<tr>
<td>§ 41-319(A)</td>
<td>Notaries Public, notarial acts that violate attorney-client privilege</td>
</tr>
<tr>
<td>§ 41-401(L)</td>
<td>Constitutional Defense Council, executive session</td>
</tr>
<tr>
<td>§ 41-608.04</td>
<td>Military Family Relief Fund, applications for assistance</td>
</tr>
<tr>
<td>§ 41-619.54</td>
<td>Administrative Boards and Commissions, Board of Fingerprinting, confidentiality of criminal history record information</td>
</tr>
<tr>
<td>§ 41-735(C),(D)</td>
<td>Department of Administration and Personnel Board, finance, internal audit examination/records</td>
</tr>
<tr>
<td>§ 41-777</td>
<td>Department of Administration, criminal records checks</td>
</tr>
<tr>
<td>§ 41-785(B)</td>
<td>Department of Administration and Personnel Board, appeals</td>
</tr>
<tr>
<td>§ 41-1279.02(C)</td>
<td>Auditor General, personnel criminal history records</td>
</tr>
<tr>
<td>§ 41-1279.04(C)</td>
<td>Auditor General, state tax returns, report contents</td>
</tr>
<tr>
<td>§ 41-1279.05</td>
<td>Auditor General, confidential records</td>
</tr>
<tr>
<td>§ 41-1279.08(G)</td>
<td>Auditor General</td>
</tr>
<tr>
<td>§ 41-1376(A)(3)</td>
<td>Office of Ombudsman-Citizens Aide, powers and duties</td>
</tr>
<tr>
<td>§ 41-1377(E),(F),(G)</td>
<td>Office of Ombudsman-Citizens Aide, investigations regarding confidential information</td>
</tr>
<tr>
<td>§ 41-1378</td>
<td>Office of Ombudsman-Citizens Aide, investigation authority and confidential records</td>
</tr>
<tr>
<td>§ 41-1379(A)</td>
<td>Office of Ombudsman-Citizens Aide, procedures after an investigation</td>
</tr>
<tr>
<td>§ 41-1380(D)</td>
<td>Ombudsman-citizens aide protections, records and files</td>
</tr>
<tr>
<td>§ 41-1481(A),(B)</td>
<td>Civil Rights Division, enforcement procedures for discrimination in employment, complaints and investigation</td>
</tr>
<tr>
<td>§ 41-1482</td>
<td>Civil Rights Division, enforcement procedures for discrimination in employment, furnishing information to governmental agencies</td>
</tr>
<tr>
<td>§ 41-1491.26(D),(E)</td>
<td>Civil Rights Division, fair housing, conciliation</td>
</tr>
</tbody>
</table>

6-28 Revised 2011
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Solar Energy Tax Incentives, applications for § 41-1510.01(C)
Renewable Energy Tax Incentives, business information § 41-1511(U)
Healthy Forest Enterprise Incentives, report information § 41-1516 (H)
Motion Picture Production Tax Incentives, applicant information § 41-1517(S),
-1517.01(J)
Enterprise Zone Tax Credit, applicant information § 41-1525(F)
Department of Corrections, prisoner medical history information § 41-1606(B)
Division of Arizona Highway Patrol, central state repository,
disclosure of criminal history record information § 41-1750
(G),(Q),(T),(V)
Department of Economic Security, confidential information § 41-1959
Department of Economic Security, day care homes,
child care personnel, notarized forms § 41-1964(D)
Department of Economic Security, child care provider
notarized forms § 41-1967.01
State Administration of Weights and Measures, information
regarding complainant § 41-2065(F)
Department of Building and Fire Safety, non-disclosable records § 41-2167(C)
Arizona Procurement Code, competitive sealed bidding § 41-2533(D)
Arizona Procurement Code, competitive sealed proposals § 41-2534(D)
Arizona Procurement Code, information submitted by bidders § 41-2535(B)(5)
Arizona Procurement Code, competitive selection procedures § 41-2538(D)
Arizona Procurement Code, furnished information § 41-2540(B),
-2578, -2579
Arizona Procurement Code, solicitation and award of grants § 41-2702
Government Information Technology Agency, powers and duties § 41-3504(D)
Human Rights Committee, information provided to § 41-3804
Department of Commerce, Arizona International
Development Authority, powers and duties § 41-4504(C)

Taxation
Department of Revenue, general powers and duties,
providing information and advice § 42-1004(A)(6)
Administration, setoff for debts § 42-1122(Q)
Financial institution data match § 42-1207
Taxpayer Protection and Services, confidentiality of taxpayer
information § 42-2001
Taxpayer Protection and Services, disclosure of confidential
information prohibited § 42-2002
Appendix 6.1

Records Made Confidential/Non-Disclosable by Arizona Statute
(In Order by Title/Statute)

Taxpayer Protection and Services, authorized disclosure of confidential information § 42-2003
Taxpayer communications § 42-2069

Taxation of Income
Returns, confidentiality of information if returns prepared by person other than taxpayer § 43-381

Trade and Commerce
Uniform Unclaimed Property Act, confidential information and Disclosure § 44-323; -322(D)
Uniform Trade Secrets Act, preservation of secrecy § 44-405
Telephone Solicitations, subpoena/evidence, confidential information § 44-1280
Trade Practices; personally identifying information § 44-1373
Trade Practices, Social Security Numbers § 44-1373.02
Petroleum Industry Information § 44-1374
Uniform State Antitrust Act, investigation, confidentiality § 44-1406
Consumer Fraud, confidentiality of information or evidence § 44-1525
Consumer Reporting Agencies, permissible use of consumer reports § 44-1692
Securities Sales, criminal records check information § 44-1813(C)
Securities Sales, information obtained by the Commission § 44-2042

Welfare
State Department of Public Welfare, power to promulgate rules concerning confidential nature of records § 46-135
Assistance, procedure to claim general assistance, finger imaging program § 46-217(C)
Assistance, procedure to claim food stamps, finger imaging program § 46-218(C)
Assistance to Dependent Children, locating deserting parents and assets, limitation on record disclosure § 46-291(E),(F)
Assistance, child care food program, fingerprinting § 46-321(H)
Child Support, case registry data sharing, unauthorized disclosure § 46-442(C)
Adult Protective Services, duty to report abuse, reports § 46-454(E)

6-30 Revised 2011
### Appendix 6.1

**Records Made Confidential/Non-Disclosable by Arizona Statute**  
*(In Order by Title/Statute)*

#### Environment

<table>
<thead>
<tr>
<th>Description</th>
<th>Section(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Quality Department, permit application</td>
<td>§ 49-111</td>
</tr>
<tr>
<td>Water Quality Control, availability of information to the public</td>
<td>§ 49-205(A)</td>
</tr>
<tr>
<td>Aquifer Protection Permits, financial information</td>
<td>§ 49-243(N)</td>
</tr>
<tr>
<td>Water Quality Control, remedial actions, information gathering and access</td>
<td>§ 49-288(B)</td>
</tr>
<tr>
<td>Water Quality Control, remedial actions</td>
<td>§ 49-292.01(B)</td>
</tr>
<tr>
<td>Water Quality Control, remedial actions, financial hardship settlements</td>
<td>§ 49-292.02(B)</td>
</tr>
<tr>
<td>State Air Pollution Control, classification and reporting, confidential records</td>
<td>§ 49-432(C),(D),(E),(F)</td>
</tr>
<tr>
<td>County Air Pollution Control, classification and reporting, confidential records</td>
<td>§ 49-487(C)</td>
</tr>
<tr>
<td>Management of Used Oil, federal used oil program</td>
<td>§ 49-802(E)</td>
</tr>
<tr>
<td>Hazardous Waste Management, availability of information to the public</td>
<td>§ 49-928</td>
</tr>
<tr>
<td>Pollution Prevention, availability of information to the public</td>
<td>§ 49-967</td>
</tr>
<tr>
<td>Underground Storage Tank Regulation, confidentiality of records</td>
<td>§ 49-1012</td>
</tr>
<tr>
<td>Underground Storage Tank Regulation, financial information</td>
<td>§ 49-1017.01(D)</td>
</tr>
</tbody>
</table>
## Appendix 6.2

### RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Record Description</th>
<th>Statute References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abandoned property records, documents, information (DOR)</td>
<td>A.R.S. § 44-323</td>
</tr>
<tr>
<td>Abortion</td>
<td>A.R.S. § 36-2152; -2163</td>
</tr>
<tr>
<td>Accident reports required by city or town</td>
<td>A.R.S. § 28-671</td>
</tr>
<tr>
<td>Accountancy board records</td>
<td>A.R.S. § 32-749</td>
</tr>
<tr>
<td>Achievement profiles, school district</td>
<td>A.R.S. § 15-241(C)</td>
</tr>
<tr>
<td>Acquisitions, insurance, submitted information pertaining to</td>
<td>A.R.S. §§ 20-481.25(C), 20-517(D)</td>
</tr>
<tr>
<td>Actuary, information provided to reviewing</td>
<td>A.R.S. § 20-696.06(E)</td>
</tr>
<tr>
<td>Actuarial Opinion &amp; Memorandum</td>
<td>A.R.S. § 20-696.04(F); -697.01</td>
</tr>
<tr>
<td>Administration of Weights and Measures</td>
<td>A.R.S. § 41-2065(F)</td>
</tr>
<tr>
<td>Adoption records and information</td>
<td>A.R.S. §§ 8-106.01, 8-115(A), 8-120, 8-121, 8-134, 8-144, 36-2903.01(S)</td>
</tr>
<tr>
<td>Adult care homes, records</td>
<td>A.R.S. § 36-446.10</td>
</tr>
<tr>
<td>Adult protective services</td>
<td>A.R.S. §§ 41-1959, 46-454(E)</td>
</tr>
<tr>
<td>Agricultural laboratories test results</td>
<td>A.R.S. § 3-145(D)</td>
</tr>
<tr>
<td>Agricultural operations</td>
<td>A.R.S. § 3-266(A)</td>
</tr>
<tr>
<td>AHCCCS</td>
<td>A.R.S. §§ 36-2903 (J), 36-2903.01(S), 36-2917(C), 36-2932((F), 36-2986(E)</td>
</tr>
<tr>
<td>AHCCCS review committee information</td>
<td>A.R.S. § 36-2917</td>
</tr>
<tr>
<td>AHCCCS records</td>
<td>A.R.S. §§ 36-2903, 41-1377(F), 41-1378</td>
</tr>
<tr>
<td>AIDS</td>
<td>A.R.S. §§ 36-661, et seq.</td>
</tr>
<tr>
<td>Air pollution control</td>
<td>A.R.S. §§ 49-432(C)-(F), 49-487(C)</td>
</tr>
<tr>
<td>Alcoholic beverages</td>
<td>A.R.S. § 4-112(F)</td>
</tr>
<tr>
<td>Animal and bird feeds, information concerning an individual’s operations</td>
<td>A.R.S. § 3-2604(A)(1)</td>
</tr>
<tr>
<td>Aquifer protection permits</td>
<td>A.R.S. § 49-243</td>
</tr>
<tr>
<td>Arbitrators, protective orders</td>
<td>A.R.S. § 12-3017(E)</td>
</tr>
<tr>
<td>Architects, assayers, engineers, geologists and surveyors</td>
<td>A.R.S. §§ 32-147, 32-129</td>
</tr>
<tr>
<td>Architects, assayers, engineers, geologists and surveyors, board reports</td>
<td>A.R.S. § 32-147</td>
</tr>
</tbody>
</table>
## Appendix 6.2

<table>
<thead>
<tr>
<th>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona Corporation Commission</td>
</tr>
<tr>
<td>Arizona Procurement Code, information provided in grant applications</td>
</tr>
<tr>
<td>Arrest records</td>
</tr>
<tr>
<td>Attorney-client privilege</td>
</tr>
<tr>
<td>Attorney General opinion requests</td>
</tr>
<tr>
<td>Auditor General</td>
</tr>
<tr>
<td>Audits</td>
</tr>
<tr>
<td>Authorized agency, confidentially held information</td>
</tr>
<tr>
<td>Automobile accident reports</td>
</tr>
<tr>
<td>Banking department’s financial institution records, examinations concerning</td>
</tr>
<tr>
<td>Banks and banking, trust and escrow records</td>
</tr>
<tr>
<td>Behavioral health professionals</td>
</tr>
<tr>
<td>Bids</td>
</tr>
<tr>
<td>Birth information</td>
</tr>
<tr>
<td>Board of Appraisal</td>
</tr>
<tr>
<td>Board of Fingerprinting</td>
</tr>
<tr>
<td>Board of Funeral Directors, exam materials</td>
</tr>
<tr>
<td>Board of Medical Examiners, records</td>
</tr>
<tr>
<td>Board of Physical Therapy,</td>
</tr>
<tr>
<td>Board of Supervisors, Board powers relating to hospitals</td>
</tr>
<tr>
<td>Board reports</td>
</tr>
<tr>
<td>Cannabis tax licenses, applications and payments for</td>
</tr>
<tr>
<td>Captive insurers, licensing, authority</td>
</tr>
<tr>
<td>Charges</td>
</tr>
<tr>
<td>Child abuse reports/medical records</td>
</tr>
<tr>
<td>Child care group homes, information relating to</td>
</tr>
<tr>
<td>Child care provider notarized forms</td>
</tr>
</tbody>
</table>
## Appendix 6.2

### RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Description</th>
<th>Section Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child Custody and Visitation, victims of domestic violence</td>
<td>A.R.S. § 25-439(D)</td>
</tr>
<tr>
<td>Child Day Care Programs</td>
<td>A.R.S. § 36-883.02, 36-897.03</td>
</tr>
<tr>
<td>Child fatalities review team records</td>
<td>A.R.S. § 36-3503(D)</td>
</tr>
<tr>
<td>Child immunizations (identifying information)</td>
<td>A.R.S. § 36-135(E)</td>
</tr>
<tr>
<td>Child Protective Services investigations</td>
<td>A.R.S. § 41-1959</td>
</tr>
<tr>
<td>Child support</td>
<td>A.R.S. §§ 25-523, 25-638, 46-291, 46-442(C)</td>
</tr>
<tr>
<td>Child support case registry</td>
<td>A.R.S. § 46-442(C)</td>
</tr>
<tr>
<td>Child welfare and placement records</td>
<td>A.R.S. §§ 8-541, 8-542</td>
</tr>
<tr>
<td>Child welfare mediation program</td>
<td>A.R.S. § 8-809</td>
</tr>
<tr>
<td>Chronic disease surveillance system information</td>
<td>A.R.S. § 36-133(F)</td>
</tr>
<tr>
<td>Citrus fruit standardization, commercial information</td>
<td>A.R.S. §§ 3-449.03; -450(G)</td>
</tr>
<tr>
<td>Civil Rights Division</td>
<td>A.R.S. §§ 41-1481(A),(B), 41-1482, 41-1491.26(D),(E)</td>
</tr>
<tr>
<td>Clearance of records (wrongful arrests, indictment, charges)</td>
<td>A.R.S. § 13-4051(B)</td>
</tr>
<tr>
<td>Clergy privilege</td>
<td>A.R.S. §§ 8-805, 12-2233</td>
</tr>
<tr>
<td>Client names</td>
<td>A.R.S. § 49-802(E)</td>
</tr>
<tr>
<td>Confidential intermediaries</td>
<td>A.R.S. § 8-134</td>
</tr>
<tr>
<td>College savings plan, program requirements</td>
<td>A.R.S. § 15-1875(R)</td>
</tr>
<tr>
<td>Commercial information</td>
<td>A.R.S. §§ 3-407(C); -410(E); -412(I); -422</td>
</tr>
<tr>
<td>Commerce Department and Economic Development Comm’n records</td>
<td>A.R.S. §§ 41-1505.06, 41-1505.07</td>
</tr>
<tr>
<td>Commissioners, Judges, Justices, personally identifiable voter registration information</td>
<td>A.R.S. § 16-153</td>
</tr>
<tr>
<td>Complaints</td>
<td>A.R.S. §§ 27-308, 32-2045(D), (E), 32-2237(G), 41-1481</td>
</tr>
<tr>
<td>Commerce and Economic Development Commission</td>
<td>A.R.S. § 41-1505.06(D)</td>
</tr>
<tr>
<td>Complainants, information pertaining to</td>
<td>A.R.S. § 41-2065</td>
</tr>
<tr>
<td>Computer Election Programs, filing of</td>
<td>A.R.S. § 16-445(D)</td>
</tr>
<tr>
<td>Computer Security Information, proprietary or confidential</td>
<td>A.R.S. § 13-2316.02</td>
</tr>
</tbody>
</table>
## Appendix 6.2

### RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Record Description</th>
<th>A.R.S. Section(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concealed weapon permit records</td>
<td>A.R.S. § 13-3112</td>
</tr>
<tr>
<td>Conciliation, matters relating to</td>
<td>A.R.S. § 41-1491.26</td>
</tr>
<tr>
<td>Conciliation agreements</td>
<td>A.R.S. § 41-1491.26</td>
</tr>
<tr>
<td>Condominium Associations, books and records</td>
<td>A.R.S. § 33-1258(B),(C)</td>
</tr>
<tr>
<td>Confidential Communications</td>
<td>A.R.S. §§ 25-381.16(D), 32-2085</td>
</tr>
<tr>
<td>Confidential records pertaining to appraisal</td>
<td>A.R.S. § 32–3631(A)(10)</td>
</tr>
<tr>
<td>Conflict of Interest</td>
<td>A.R.S. §§ 38-504, 38-507</td>
</tr>
<tr>
<td>Constitutional Defense Council</td>
<td>A.R.S. § 41-401(L)</td>
</tr>
<tr>
<td>Consumer Fraud</td>
<td>A.R.S. § 44-1525</td>
</tr>
<tr>
<td>Consumer Protection, consumer information pertaining to Electric Power Competition</td>
<td>A.R.S. § 30-806(D)</td>
</tr>
<tr>
<td>Consumer reports</td>
<td>A.R.S. § 44-1692</td>
</tr>
<tr>
<td>Controlled substances prescription monitoring, information relating to</td>
<td>A.R.S. § 36-2604</td>
</tr>
<tr>
<td>Controlled substances tax licenses, information relating to</td>
<td>A.R.S. § 42-2002</td>
</tr>
<tr>
<td>Corporation Commission, information furnished to</td>
<td>A.R.S. § 40-204(C)</td>
</tr>
<tr>
<td>Cosmetology regulation, confidentiality of education records</td>
<td>A.R.S. § 32-576</td>
</tr>
<tr>
<td>County Recorder, discharge papers of service personnel</td>
<td>A.R.S. § 11-465</td>
</tr>
<tr>
<td>County Recorder, Records maintained by</td>
<td>A.R.S. § 11-483(A)</td>
</tr>
<tr>
<td>County Treasurer, Disclosure of Confidential Information; violation; classification</td>
<td>A.R.S. § 11-505</td>
</tr>
<tr>
<td>Crime victim communications</td>
<td>A.R.S. §§ 13-4430, 13-4434</td>
</tr>
<tr>
<td>Criminal history record information</td>
<td>A.R.S. §§ 41-619.54, 41-1279.02(C), 41-1750</td>
</tr>
<tr>
<td>Criminal justice information</td>
<td>A.R.S. § 41-1750</td>
</tr>
<tr>
<td>Customer information</td>
<td>A.R.S. § 40-202(C)(5)</td>
</tr>
<tr>
<td>Dairies and dairying, financial condition of milk handlers</td>
<td>A.R.S. § 3-609(A)(3)</td>
</tr>
<tr>
<td>Death record information, for county recorder voter registration purposes</td>
<td>A.R.S. § 16-165</td>
</tr>
<tr>
<td>Dental board, pending complaints and investigations</td>
<td>A.R.S. § 32-1207</td>
</tr>
<tr>
<td>Naturopathic Medicine</td>
<td>A.R.S. §§ 32-1525, -1551.01(E)</td>
</tr>
<tr>
<td>Department of Administration</td>
<td>A.R.S. § 41-777</td>
</tr>
<tr>
<td>Department of Building and Fire Safety</td>
<td>A.R.S. § 41-2065(F)</td>
</tr>
<tr>
<td></td>
<td>A.R.S. §§ 41-1505.06(D), 41-</td>
</tr>
</tbody>
</table>
### Appendix 6.2

<table>
<thead>
<tr>
<th>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Commerce</td>
</tr>
<tr>
<td>Department of Corrections</td>
</tr>
<tr>
<td>Department of Developmental Disabilities</td>
</tr>
<tr>
<td>Department of Economic Security</td>
</tr>
<tr>
<td>Department of Health Services</td>
</tr>
<tr>
<td>Department of Public Safety</td>
</tr>
<tr>
<td>Department of Revenue</td>
</tr>
<tr>
<td>Department of State</td>
</tr>
<tr>
<td>Department of Library, Archives and Public Records</td>
</tr>
<tr>
<td>Dependent Children</td>
</tr>
<tr>
<td>Developmental Disabilities</td>
</tr>
<tr>
<td>Disclosure limitations and conditions, insurance</td>
</tr>
<tr>
<td>Dispositions, insurer’s report of</td>
</tr>
<tr>
<td>Dissolution of marriage, confidential communications</td>
</tr>
<tr>
<td>Dissolution of marriage, records pertaining to maintenance and support</td>
</tr>
<tr>
<td>Doctor and patient communications</td>
</tr>
<tr>
<td>Domestic violence shelters</td>
</tr>
<tr>
<td>Domestic Violence fatality review teams, information acquired by</td>
</tr>
<tr>
<td>Driver’s license registration</td>
</tr>
<tr>
<td>Draft audit files and draft working papers</td>
</tr>
<tr>
<td>Drug testing, employee, records and results pertaining to</td>
</tr>
<tr>
<td>Eavesdropping</td>
</tr>
</tbody>
</table>
## Appendix 6.2

### Records Made Confidential/Non-Disclosable by Arizona Statute

<table>
<thead>
<tr>
<th>Category</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election programs, filing of computer</td>
<td>A.R.S. § 16-445(D)</td>
</tr>
<tr>
<td>Electric power competition, consumer and account information</td>
<td>A.R.S. § 30-806(D)</td>
</tr>
<tr>
<td>Electric retail competition information, records pertaining to competitive activity</td>
<td>A.R.S. § 30-808</td>
</tr>
<tr>
<td>Emergency medical services</td>
<td>A.R.S. § 36-2220; -2245</td>
</tr>
<tr>
<td>Employees</td>
<td>A.R.S. § 38-504</td>
</tr>
<tr>
<td>Employee drug testing, records and results pertaining to</td>
<td>A.R.S. § 23-403.09</td>
</tr>
<tr>
<td>Employer reporting, new hires</td>
<td>A.R.S. § 23-722.01(G)</td>
</tr>
<tr>
<td>Employment</td>
<td>A.R.S. § 41-1279.02(B)</td>
</tr>
<tr>
<td>Employment security, sworn and unsworn reports</td>
<td>A.R.S. § 23-722(A)</td>
</tr>
<tr>
<td>Enforcement actions, disclosure of information related to</td>
<td>A.R.S. § 3-374</td>
</tr>
<tr>
<td>Enterprise Zone Tax Credit, applicant information</td>
<td>A.R.S. § 41-1525</td>
</tr>
<tr>
<td>Environmental Quality Department</td>
<td>A.R.S. § 49-111</td>
</tr>
<tr>
<td>Evidence of insurance coverage, identity of the natural parent</td>
<td>A.R.S. § 20-1057(L)</td>
</tr>
<tr>
<td>Examination records</td>
<td>A.R.S. §§ 32-2214(G), -82(C)</td>
</tr>
<tr>
<td>Examination synopses pertaining to insurance companies</td>
<td>A.R.S. § 20-234(C)</td>
</tr>
<tr>
<td>Executioners, identity of</td>
<td>A.R.S. § 13-754</td>
</tr>
<tr>
<td>Executive Clemency; parolees, address of victim and victim’s family</td>
<td>A.R.S. § 31-412(F)</td>
</tr>
<tr>
<td>Executive session</td>
<td>A.R.S. §§ 38-431.03(B), 38-655(E), 41-401(L)</td>
</tr>
<tr>
<td>Expiration dates and policy information, insurance on mortgaged property</td>
<td>A.R.S. § 20-475.01</td>
</tr>
<tr>
<td>Family support duties, financial institutions data match</td>
<td>A.R.S. § 25-523</td>
</tr>
<tr>
<td>Family support duties, pleadings and accompanying documents</td>
<td>A.R.S. § 25-638(C)</td>
</tr>
<tr>
<td>Fiduciary communications</td>
<td>A.R.S. § 14-5651</td>
</tr>
</tbody>
</table>

6-37 Revised 2011
### Appendix 6.2

<table>
<thead>
<tr>
<th>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial analysis ratios, pertaining to insurance companies</td>
</tr>
<tr>
<td>Financial institutions data match, family support duties</td>
</tr>
<tr>
<td>Financial information</td>
</tr>
<tr>
<td>Financial institution data match</td>
</tr>
<tr>
<td>Finger imaging</td>
</tr>
<tr>
<td>Fingerprints</td>
</tr>
<tr>
<td>Fire Marshall</td>
</tr>
<tr>
<td>Foster care, special advocate</td>
</tr>
<tr>
<td>Foster Care Review Board, child welfare records</td>
</tr>
<tr>
<td>Freestanding urgent health care center incident reporting; confidentiality</td>
</tr>
<tr>
<td>Fruit and vegetable standardization, commercial information</td>
</tr>
<tr>
<td>Genetic test results, insurance information related to</td>
</tr>
<tr>
<td>Genetic testing results, confidentiality</td>
</tr>
<tr>
<td>Geospatial data sharing, critical infrastructure information</td>
</tr>
<tr>
<td>Geothermal resources, well records</td>
</tr>
<tr>
<td>Grand Jury testimony or decision</td>
</tr>
<tr>
<td>Hazardous wastes</td>
</tr>
<tr>
<td>Health Care Directive Registry</td>
</tr>
<tr>
<td>Health care information</td>
</tr>
<tr>
<td>Health care institution records</td>
</tr>
<tr>
<td>Health care quality assurance</td>
</tr>
<tr>
<td>Health Care Utilization Review Committees, records, proceedings and materials used in connection with</td>
</tr>
<tr>
<td>Healthy Families pilot program</td>
</tr>
<tr>
<td>Healthy Forest Enterprise Incentives, report information</td>
</tr>
<tr>
<td>Hearing aid dispensers, clinical or confidential information</td>
</tr>
</tbody>
</table>
# Appendix 6.2

## RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Record Type</th>
<th>Arizona Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing information</td>
<td>A.R.S. § 8-115(A)</td>
</tr>
<tr>
<td>Hearings</td>
<td>A.R.S. § 41-785(B)</td>
</tr>
<tr>
<td>HIV Information</td>
<td>A.R.S. §§ 13-1415(B); 20-448.01; 23-1043.02; 32-2556</td>
</tr>
<tr>
<td>Home address and telephone numbers</td>
<td>A.R.S. §§ 32-2051(B), -2916(B)</td>
</tr>
<tr>
<td>Homeopathic physicians</td>
<td>A.R.S. §§ 32-2916(B), -2934(A), -2935(D),(E),(F)</td>
</tr>
<tr>
<td>Human Rights Committee, information provided to</td>
<td>A.R.S. § 41-3804</td>
</tr>
<tr>
<td>Identity of informants</td>
<td>A.R.S. §§ 32-2081, -2049(C), -2551(A), -2934(A), -3052(C), -3442(A), -3553(B), 41-2167(C)(1)</td>
</tr>
<tr>
<td>Identity of natural parent</td>
<td>A.R.S. §§ 20-826(K), -934(I), -1057(L), -1342(A)(12), -1402(A)(8), -2321</td>
</tr>
<tr>
<td>Indictment, information and complaints, disclosure of</td>
<td>A.R.S. § 13-2813</td>
</tr>
<tr>
<td>Industrial Commission, information sharing</td>
<td>A.R.S. § 23-107</td>
</tr>
<tr>
<td>Informal proceedings, matters pertaining to</td>
<td>A.R.S. § 41-1481(B)</td>
</tr>
<tr>
<td>Information technology agency</td>
<td>A.R.S. § 41-3504(D)</td>
</tr>
<tr>
<td>Inspections</td>
<td>A.R.S. §§ 3-3121, 27-239, 49-432</td>
</tr>
<tr>
<td>Inspectors and Employees, State Mine, restrictions on divulging information by</td>
<td>A.R.S. § 27-127</td>
</tr>
<tr>
<td>Insurance, Administrative Officers and Procedures, report of examinations by director</td>
<td>A.R.S. § 20-158(D)</td>
</tr>
<tr>
<td>Insurance, authorized agency, confidentially held information</td>
<td>A.R.S. § 20-1904</td>
</tr>
<tr>
<td>Insurance, information pertaining to HIV</td>
<td>A.R.S. § 20-448.01</td>
</tr>
<tr>
<td>Insurance, information provided to rating organizations</td>
<td>A.R.S. § 20-364</td>
</tr>
<tr>
<td>Insurance, utilization review, information concerning customers, patients, and utilization reviews</td>
<td>A.R.S. § 20-2504(D)</td>
</tr>
<tr>
<td>Insurance acquisitions, submitted information pertaining to</td>
<td>A.R.S. § 20-481.25(C)</td>
</tr>
<tr>
<td>Insurance actuary, information provided to</td>
<td>A.R.S. § 20-696.06(E)</td>
</tr>
<tr>
<td>Insurance administrators, records maintained by</td>
<td>A.R.S. § 20-485.03(B)</td>
</tr>
<tr>
<td>Appendix 6.2</td>
<td></td>
</tr>
<tr>
<td><strong>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</strong></td>
<td></td>
</tr>
<tr>
<td>Insurance companies, financial analysis ratio and examination synopses</td>
<td>A.R.S. § 20-234(C)</td>
</tr>
<tr>
<td>Insurance contracts</td>
<td>A.R.S. § 38-655(E)</td>
</tr>
<tr>
<td>Insurance coverage, evidence of, identity of natural parents</td>
<td>A.R.S. § 20-1057(L)</td>
</tr>
<tr>
<td>Insurance disclosure and privacy protections</td>
<td>A.R.S. § 20-2113</td>
</tr>
<tr>
<td>Insurance expiration dates and policy information</td>
<td>A.R.S. § 20-473</td>
</tr>
<tr>
<td>Insurance fraud unit, investigative materials</td>
<td>A.R.S. § 20-466(D)</td>
</tr>
<tr>
<td>Insurance holding company systems, investigative records</td>
<td>A.R.S. § 20-481.21</td>
</tr>
<tr>
<td>Insurance holding company system statements</td>
<td>A.R.S. § 20-481.03(A)(4)</td>
</tr>
<tr>
<td>Insurance information, genetic test results</td>
<td>A.R.S. § 20-448.02</td>
</tr>
<tr>
<td>Insurance producer licensing, sharing of information</td>
<td>A.R.S. § 20-299</td>
</tr>
<tr>
<td>Insurer claim files</td>
<td>A.R.S. § 20-157.01(B)</td>
</tr>
<tr>
<td>Insurer’s disclosure of information, confidential source’s of information</td>
<td>A.R.S. § 20-1902(E)</td>
</tr>
<tr>
<td>Insurer’s report of acquisitions and dispositions</td>
<td>A.R.S. § 20-517(D)</td>
</tr>
<tr>
<td>Insurer’s reports of professional liability claims</td>
<td>A.R.S. § 20-1742</td>
</tr>
<tr>
<td>Insuring powers limitations, identity of natural parent</td>
<td>A.R.S. § 20-934(I)</td>
</tr>
<tr>
<td>Intellectual property, university trade secrets</td>
<td>A.R.S. § 15-1640</td>
</tr>
<tr>
<td>Interrogatories</td>
<td>A.R.S. § 10-1634, 10-2542</td>
</tr>
<tr>
<td>Interference with judicial proceedings</td>
<td>A.R.S. § 12-2813</td>
</tr>
<tr>
<td>Interstate compacts for military children</td>
<td>A.R.S. § 15-1911</td>
</tr>
<tr>
<td>Inventory</td>
<td>A.R.S. § 36-3712</td>
</tr>
<tr>
<td>Investigations, disclosure of information related to</td>
<td>A.R.S. §§ 3-3121, 4-112(F), 6-129, 8-811, 11-593, 13-2315, 20-466(D), -481.21, 27-239, 32-129, -2082(E), -2237(G), -2552(C), -2935(D), -2935(E), -36-756.01, 41-1376(A), -1376(A)(3), -1378, -1481, -1482, -1959, -2065(F), -2167(C), 42-2002(C), 44-1406, -1525, 49-205, -288(B), -487(C), -928, -967</td>
</tr>
<tr>
<td>Judges, Justices, Commissioners, personally identifiable voter registration information</td>
<td>A.R.S. § 16-153</td>
</tr>
<tr>
<td>Jurors, medical statements concerning inability to serve</td>
<td>A.R.S. § 21-202(B)(1)(c)</td>
</tr>
</tbody>
</table>
## RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Record Category</th>
<th>Arizona Statute(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juror records</td>
<td>A.R.S. § 21-312</td>
</tr>
<tr>
<td>Juvenile court records</td>
<td>A.R.S. § 8-208</td>
</tr>
<tr>
<td>Land reclamation, mined, records pertaining to</td>
<td>A.R.S. § 27-930</td>
</tr>
<tr>
<td>Lease of state lands</td>
<td>A.R.S. § 37-282</td>
</tr>
<tr>
<td>Lease of state lands for mineral claims</td>
<td>A.R.S. §§ 27-112; -233(B); -234(F)&amp;(H), -239, -274; -571; -1231</td>
</tr>
<tr>
<td>Lessee, information furnished by</td>
<td>A.R.S. § 37-282</td>
</tr>
<tr>
<td>Library records</td>
<td>A.R.S. § 41-1354</td>
</tr>
<tr>
<td>Light rail transit systems, public records, confidentiality</td>
<td>A.R.S. § 28-9202</td>
</tr>
<tr>
<td>Lottery Commission, information maintained by</td>
<td>A.R.S. § 5-504(G)</td>
</tr>
<tr>
<td>Maintenance and support, dissolution of marriage, records pertaining to payment of</td>
<td>A.R.S. § 25-322(E)</td>
</tr>
<tr>
<td>Malpractice claims and actions, insurer’s reports of</td>
<td>A.R.S. § 20-1742(B)</td>
</tr>
<tr>
<td>Marital and domestic relations, Information to be submitted to the court</td>
<td>A.R.S. § 25-1039</td>
</tr>
<tr>
<td>Maternal and child health programs</td>
<td>A.R.S. §§ 36-697(G); -694(E)</td>
</tr>
<tr>
<td>Market and economic analysis</td>
<td>A.R.S. § 36-37132(B)(4)</td>
</tr>
<tr>
<td>Marketing orders and agreements</td>
<td>A.R.S. §§ 3-407(C); -410; -412; -422</td>
</tr>
<tr>
<td>Maternity benefits and coverage, insurance, identity of the natural parent</td>
<td>A.R.S. § 20-2321(C)</td>
</tr>
<tr>
<td>Mediation process</td>
<td>A.R.S. § 12-2238</td>
</tr>
<tr>
<td>Medical marijuana act, cardholder identifying information in annual report</td>
<td>A.R.S. § 36-2809</td>
</tr>
<tr>
<td>Medical marijuana act, non-disclosable address information in on-line registration system</td>
<td>A.R.S. § 36-2807</td>
</tr>
<tr>
<td>Medical marijuana act, records kept by health department</td>
<td>A.R.S. § 36-2810</td>
</tr>
</tbody>
</table>
| Medical records                                                  | A.R.S. §§ 12-2292 through -2294, 20-2509, 32-2552(C), (E), -2935(D),(E),(F), -3282(C), -3553(K), 33-1258(B),(C), -1805(B), -
# Appendix 6.2

## RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Category</th>
<th>Statute/Section Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mental health services</td>
<td>A.R.S. §§ 36-507, -509, -517.02</td>
</tr>
<tr>
<td>Midwifery</td>
<td>A.R.S. § 36-756.01</td>
</tr>
<tr>
<td>Mine Inspector, State, restrictions on divulging information by inspectors and employees</td>
<td>A.R.S. § 27-127</td>
</tr>
<tr>
<td>Mined land reclamation</td>
<td>A.R.S. § 27-930</td>
</tr>
<tr>
<td>Mineral appraisals, information relating to</td>
<td>A.R.S. § 27-234(F)(G)&amp;(H)</td>
</tr>
<tr>
<td>Mineral exploration permit, terms of</td>
<td>A.R.S. § 27-252(A)(8)</td>
</tr>
<tr>
<td>Minerals, Oil, and Gas, well records</td>
<td>A.R.S. § 27-522(B)</td>
</tr>
<tr>
<td>Minors, infant care review committee pertaining to</td>
<td>A.R.S. § 36-2284(C)</td>
</tr>
<tr>
<td>Mortgage guarantee insurance, information relating to reinsurance agreements</td>
<td>A.R.S. § 20-1557(F)</td>
</tr>
<tr>
<td>Motion Picture Tax Incentives, applicant information</td>
<td>A.R.S. § 41-1517; -1517.01</td>
</tr>
<tr>
<td>New Hires, employer reporting</td>
<td>A.R.S. § 23-722.01(G)</td>
</tr>
<tr>
<td>MVD records, release of personal information</td>
<td>A.R.S. § 28-455</td>
</tr>
<tr>
<td>Notarial acts</td>
<td>A.R.S. § 41-319(A)</td>
</tr>
<tr>
<td>Notaries Public</td>
<td>A.R.S. § 41-319(A)</td>
</tr>
<tr>
<td>Notarized forms</td>
<td>A.R.S. §§ 41-1964(D), 46-321(H)</td>
</tr>
<tr>
<td>Occupational safety and health, trade secrets</td>
<td>A.R.S. § 23-426</td>
</tr>
<tr>
<td>Offenses against public order</td>
<td>A.R.S. § 13-2913</td>
</tr>
<tr>
<td>Office of Ombudsman-Citizens Aide</td>
<td>A.R.S. §§ 41-1376(A)(3), 41-1377(E) through (G), -1378, -1379, -1380(D)</td>
</tr>
<tr>
<td>Ombudsman Citizen’s Aide, records and files maintained by</td>
<td>A.R.S. § 41-1380(D)</td>
</tr>
<tr>
<td>Operations of mines, complaint to inspector of dangerous conditions</td>
<td>A.R.S. § 27-308</td>
</tr>
<tr>
<td>Open Meeting Law</td>
<td>A.R.S. § 38-431.03(B)</td>
</tr>
<tr>
<td>Opinion, Ombudsman-Citizens Aide preliminary</td>
<td>A.R.S. § 41-1379</td>
</tr>
<tr>
<td>Opinion requests, Attorney General</td>
<td>A.R.S. § 38-507</td>
</tr>
<tr>
<td>Organized crime</td>
<td>A.R.S. § 13-2315</td>
</tr>
</tbody>
</table>
### Appendix 6.2

<table>
<thead>
<tr>
<th>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parental consent proceedings</td>
</tr>
<tr>
<td>Parolees, address of victim and victim’s immediate family</td>
</tr>
<tr>
<td>Patient information</td>
</tr>
<tr>
<td>Peace officer residential address and telephone numbers</td>
</tr>
<tr>
<td>Permit applications, copies or notices associated with</td>
</tr>
<tr>
<td>Personal endangerment</td>
</tr>
<tr>
<td>Personal information maintained by professional boards</td>
</tr>
<tr>
<td>Personally identifiable information</td>
</tr>
<tr>
<td>Personnel materials</td>
</tr>
<tr>
<td>Personnel Board</td>
</tr>
<tr>
<td>Pesticides, trade secrets, commercial or financial information</td>
</tr>
<tr>
<td>Petroleum Industry Information</td>
</tr>
<tr>
<td>Photographing, surreptitious</td>
</tr>
<tr>
<td>Physician assistants</td>
</tr>
<tr>
<td>Planned communities, books and records</td>
</tr>
<tr>
<td>Pleadings and accompanying documents, family support duties</td>
</tr>
<tr>
<td>Police informants, identity of</td>
</tr>
<tr>
<td>Policy information and expiration dates, insurance on mortgaged property</td>
</tr>
<tr>
<td>Pollution prevention</td>
</tr>
<tr>
<td>Private Postsecondary Education Board</td>
</tr>
<tr>
<td>Preliminary opinion or recommendation, Ombudsman-Citizens Aide</td>
</tr>
</tbody>
</table>
## RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE

<table>
<thead>
<tr>
<th>Category</th>
<th>A.R.S. References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-sentence reports</td>
<td>§§ 13-4410, -4425</td>
</tr>
<tr>
<td>Prevention of Child Abuse Fund, donation application</td>
<td>§ 41-109</td>
</tr>
<tr>
<td>Prisoner care and custody, records relating to</td>
<td>§ 31-221(C)</td>
</tr>
<tr>
<td>Private investigators, financial statements</td>
<td>§ 32-2402(C)</td>
</tr>
<tr>
<td>Privileged communications</td>
<td>§§ 12-2231 through -2235, -2237, -2238, 13-4062, -4430, 32-2085, -3282(C), -3283, 33-1258(B)(C), -1805(B), (C), 36-405.01(D), -2903(J), -2917(C), -2932(F), 41-319(A), -1378</td>
</tr>
<tr>
<td>Proceedings</td>
<td>§§ 36-2152, -2284(C), -2403</td>
</tr>
<tr>
<td>Procurement</td>
<td>§§ 41-2533(D), -2534(D), -2535(B)(5), -2538(D), -2540(B)</td>
</tr>
<tr>
<td>Professional corporations</td>
<td>§ 10-2233</td>
</tr>
<tr>
<td>Programs, computer election, filing of</td>
<td>§ 16-445</td>
</tr>
<tr>
<td>Proposals</td>
<td>§§ 41-2534(D), -2538(D)</td>
</tr>
<tr>
<td>Proprietary information</td>
<td>§§ 13-3620(G); 37-239(E); 40-202(C)(5); 41-1505.06(D), -1553.03(C), -2533(D), -2534(D)</td>
</tr>
<tr>
<td>Psychiatric security review board, confidential records</td>
<td>§ 31-502</td>
</tr>
<tr>
<td>Psychology board</td>
<td>§§ 32-2081(A); -208; -2091.13</td>
</tr>
<tr>
<td>Public Health, enhanced surveillance advisory, information related to</td>
<td>§§ 36-783E through -790(A)</td>
</tr>
<tr>
<td>Public health control</td>
<td>§§ 36-664, -665, -666, -677(A)(2), -697(G), -714, -727</td>
</tr>
<tr>
<td>Public officers</td>
<td>§ 38-504</td>
</tr>
<tr>
<td>Public-private partnership in transportation, confidentiality and public disclosure</td>
<td>§ 28-7707</td>
</tr>
<tr>
<td>Public service corporations</td>
<td>§§ 40-202(C)(5), -204(C)</td>
</tr>
<tr>
<td>Putative father registry, adoptions</td>
<td>§ 8-106.01</td>
</tr>
<tr>
<td>RECORDS MADE CONFIDENTIAL/NON-DISCLOSABLE BY ARIZONA STATUTE</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Rating organizations, information provided to</td>
<td>A.R.S. § 20-364</td>
</tr>
<tr>
<td>Real estate, confidentiality of licensee’s address</td>
<td>A.R.S. § 32-2125.03</td>
</tr>
<tr>
<td>Receivers, information and records of appointed</td>
<td>A.R.S. § 15-103(T); -107(M)</td>
</tr>
<tr>
<td>Records maintained by insurance administrators</td>
<td>A.R.S. § 20-485.03(B)</td>
</tr>
<tr>
<td>Reinsurance intermediaries, basis for refusal to license</td>
<td>A.R.S. § 20-486.01(E)</td>
</tr>
<tr>
<td>Renewable energy tax incentives, business information</td>
<td>A.R.S. § 41-1511</td>
</tr>
<tr>
<td>Reporter and informant communications</td>
<td>A.R.S. § 12-2237</td>
</tr>
<tr>
<td>Registrants, information pertaining to</td>
<td>A.R.S. § 36-2523(C)</td>
</tr>
<tr>
<td>Registration forms, voter declination</td>
<td>A.R.S. § 16-140(C)</td>
</tr>
<tr>
<td>Registration Forms, voting</td>
<td>A.R.S. § 16-152(A)(21)</td>
</tr>
<tr>
<td>Registration records</td>
<td>A.R.S. § 32-129, 36-897.03</td>
</tr>
<tr>
<td>Reporting violations, identity of persons reporting, Board of Physical Therapy</td>
<td>A.R.S. § 32-2049</td>
</tr>
<tr>
<td>Respiratory Care Examiners Board</td>
<td>A.R.S. § 32-3553(B),(K)</td>
</tr>
<tr>
<td>Risk-based capital for insurers, information pertaining to</td>
<td>A.R.S. § 20-488.07</td>
</tr>
<tr>
<td>Rules promulgated for the protection of confidential information</td>
<td>A.R.S. § 36-107</td>
</tr>
<tr>
<td>Sale of state lands</td>
<td>A.R.S. § 37-239(E)</td>
</tr>
<tr>
<td>School Accountability, records kept by State Board of Education</td>
<td>A.R.S. § 15-241.01(J)</td>
</tr>
<tr>
<td>School district test results, annual report</td>
<td>A.R.S. § 15-743(A)(3)</td>
</tr>
<tr>
<td>Sealed court records</td>
<td>A.R.S. § 41-1378</td>
</tr>
<tr>
<td>Secretary of State</td>
<td>A.R.S. § 41-132(D)</td>
</tr>
<tr>
<td>Security Sales</td>
<td>A.R.S. § 44-1813; -2042</td>
</tr>
<tr>
<td>Self-incrimination</td>
<td>A.R.S. § 13-4508</td>
</tr>
<tr>
<td>Sex Offender registration</td>
<td>A.R.S. § 13-3823</td>
</tr>
<tr>
<td>Sexually Violent Persons</td>
<td>A.R.S. § 36-3712(C)</td>
</tr>
<tr>
<td>Shelters, for domestic violence</td>
<td>A.R.S. §§ 36-3008, -3009; -3005</td>
</tr>
</tbody>
</table>
## Appendix 6.2

<table>
<thead>
<tr>
<th>RECORDS MADE CONFIDENTIAL/_NON-DISCLOSABLE BY ARIZONA STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Silent witness program records</td>
</tr>
<tr>
<td>Silent witness reporting anonymity</td>
</tr>
<tr>
<td>Social Security Numbers, sequential use restrictions</td>
</tr>
<tr>
<td>Solar energy tax incentives, applications for</td>
</tr>
<tr>
<td>Spaying and neutering of animals fund, donation application information</td>
</tr>
<tr>
<td>Special advocates</td>
</tr>
<tr>
<td>State contracts, information presented to JLBC in executive session</td>
</tr>
<tr>
<td>State Mine Inspector, public disclosure of information</td>
</tr>
<tr>
<td>Statistical data</td>
</tr>
<tr>
<td>Standard valuation law, memoranda in support of an opinion or other material</td>
</tr>
<tr>
<td>State Board of Appraisal, confidential records</td>
</tr>
<tr>
<td>State Land Commissioner</td>
</tr>
<tr>
<td>State Mine Inspector, restrictions on divulging information by inspectors and employees</td>
</tr>
<tr>
<td>State Trauma Registry, personally identifiable information</td>
</tr>
<tr>
<td>Student level data</td>
</tr>
<tr>
<td>Student records</td>
</tr>
<tr>
<td>Subscription Contracts, identity of the natural parent</td>
</tr>
<tr>
<td>Surveillance system, chronic disease information collected on individuals</td>
</tr>
<tr>
<td>Taxpayer communications</td>
</tr>
<tr>
<td>Telephone or telegraph message, disclosure of without authority</td>
</tr>
<tr>
<td>Telemecine, confidentiality protections</td>
</tr>
<tr>
<td>Telephone subscriber information</td>
</tr>
<tr>
<td>Records Made Confidential/Non-Disclosable by Arizona Statute</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>Termination of parental rights</td>
</tr>
<tr>
<td>Testimony and witness names, grand jury</td>
</tr>
<tr>
<td>Trade secrets/practices</td>
</tr>
<tr>
<td>Transportation, accident reports required by city or town</td>
</tr>
<tr>
<td>Transportation, information supplied for commercial purposes</td>
</tr>
<tr>
<td>Transportation, information pertaining to police officers</td>
</tr>
<tr>
<td>Transportation, information relating to tax collection</td>
</tr>
<tr>
<td>Transportation, records exemption</td>
</tr>
<tr>
<td>Transportation, release of information prohibited</td>
</tr>
<tr>
<td>Transportation, tax collection</td>
</tr>
<tr>
<td>Tuberculosis Control</td>
</tr>
<tr>
<td>Unclaimed Property</td>
</tr>
<tr>
<td>Underground storage tanks</td>
</tr>
<tr>
<td>Uniform Controlled Substances Act, records pertaining to registrants</td>
</tr>
<tr>
<td>Uniform State Antitrust Act</td>
</tr>
<tr>
<td>Uniform Trade Secrets Act</td>
</tr>
<tr>
<td>Used oil program</td>
</tr>
<tr>
<td>Utilization Review, information concerning customers, patients, or utilization review plans</td>
</tr>
<tr>
<td>Utilization Review, information concerning patient information and medical records</td>
</tr>
<tr>
<td>Veterinarians</td>
</tr>
<tr>
<td>Victim communications</td>
</tr>
<tr>
<td>Victims, personal information</td>
</tr>
<tr>
<td>Victims of domestic violence, child custody and visitation</td>
</tr>
<tr>
<td>Victims rights, employee leave records</td>
</tr>
<tr>
<td>Records Made Confidential/Non-Disclosable by Arizona Statute</td>
</tr>
<tr>
<td>-------------------------------------------------------------</td>
</tr>
<tr>
<td>Voter registration, information concerning</td>
</tr>
<tr>
<td>Voter registration, personally identifiable information concerning judges, justices and commissioners</td>
</tr>
<tr>
<td>Voter registration forms</td>
</tr>
<tr>
<td>Voter registration forms, declination</td>
</tr>
<tr>
<td>Voter registration rolls, death records</td>
</tr>
<tr>
<td>Voting materials, computer election programs</td>
</tr>
<tr>
<td>Water quality control</td>
</tr>
<tr>
<td>Welfare</td>
</tr>
<tr>
<td>Welfare recipients</td>
</tr>
<tr>
<td>Well records, geothermal resources</td>
</tr>
<tr>
<td>Well records, minerals, oil, and gas</td>
</tr>
<tr>
<td>Witness names and testimony, grand jury</td>
</tr>
<tr>
<td>Workers compensation, information pertaining to the HIV virus</td>
</tr>
</tbody>
</table>
CHAPTER 7
OPEN MEETINGS

Table of Contents

Section 7.1  Scope of this Chapter
Section 7.2  Arizona's Open Meeting Law
  7.2.1  History of Arizona's Open Meeting Law
  7.2.2  Legislative Intent
Section 7.3  Government Bodies Covered by the Open Meeting Law
  7.3.1  Generally
  7.3.2  Boards and Commissions
  7.3.3  Quasi-Governmental Corporations
  7.3.4  Quasi-Judicial Bodies
  7.3.5  Advisory Committees
  7.3.6  Special and Standing Committees and Subcommittees
Section 7.4  Government Bodies and Proceedings Not Covered by the Open Meeting Law
  7.4.1  Judicial Appointment Commissions
  7.4.2  Proceedings Before Courts
  7.4.3  The Legislature
  7.4.4  Student Disciplinary Proceedings
  7.4.5  Insurance Guaranty Fund Boards
  7.4.6  Hearings Held in Prison Facilities
  7.4.7  Board of Fingerprinting

Revised 2012
7.4.8  Homeowners Associations

Section 7.5  The Actions and Activities Covered by the Open Meeting Law

7.5.1  Generally

7.5.2  Circumvention of the Open Meeting Law

7.5.3  Applicability to Staff Members and Others

Section 7.6  Notice of Meetings

7.6.1  Generally

7.6.2  Notice to Members of the Public Body

7.6.3  Notice to the Public

7.6.3.1  Disclosure Statement

7.6.3.2  Public Notice of Meetings

7.6.4  Contents of the Notice

7.6.5  Time for Giving Notice

7.6.6  Notice of Regular Meetings

7.6.7  Notice of Executive Sessions

7.6.8  Combined Notice of Public Meeting and Executive Session

7.6.9  Maintaining Records of Notice Given

Section 7.7  Agendas

7.7.1  Generally

7.7.2  Contents of the Agenda - Public Meeting

7.7.3  Contents of the Agenda - Executive Session

7.7.4  Distribution of the Agenda

7.7.5  Consent Agendas

Revised 2012
7.7.6 Discussing and Deciding Matters Not Listed on the Agenda

7.7.7 Calls to the Public

7.7.8 Current Event Summaries

7.7.9 Emergencies

7.7.10 Changes to the Agenda

Section 7.8 Minutes

7.8.1 Form of and Access to the Minutes

7.8.2 Contents of the Minutes of Public Meetings

7.8.3 Contents of the Minutes of Executive Sessions

7.8.4 Confidentiality of Executive Session Minutes

Section 7.9 Executive Sessions

7.9.1 Deciding to Go Into Executive Session

7.9.2 Executive Session Requirements

7.9.3 Authorized Executive Sessions

7.9.4 Personnel Matters

7.9.5 Confidential Records

7.9.6 Legal Advice

7.9.7 Litigation, Contract Negotiations and Settlement Discussions

7.9.8 Discussions with Designated Representatives Regarding Salary Negotiations

7.9.9 International, Interstate, and Tribal Negotiations

7.9.10 Purchase, Sale or Lease of Real Property

7.9.11 Taking Legal Action

Revised 2012
<table>
<thead>
<tr>
<th>Section 7.10</th>
<th>Public Access to Meetings</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.10.1</td>
<td>Public Participation and Access</td>
</tr>
<tr>
<td>7.10.2</td>
<td>Remote Conferencing</td>
</tr>
<tr>
<td>7.10.3</td>
<td>Record of the Proceedings</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 7.11</th>
<th>Quorum</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.11.1</td>
<td>Effect of Disqualification on the Quorum Requirement</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 7.12</th>
<th>Ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.12.1</td>
<td>Generally</td>
</tr>
<tr>
<td>7.12.2</td>
<td>Procedure for Ratification</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 7.13</th>
<th>Sanctions for Violations of the Open Meeting Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.13.1</td>
<td>Nullification</td>
</tr>
<tr>
<td>7.13.2</td>
<td>Investigation and Enforcement</td>
</tr>
<tr>
<td>7.13.3</td>
<td>Civil Penalties</td>
</tr>
<tr>
<td>7.13.4</td>
<td>Attorney's Fees</td>
</tr>
<tr>
<td>7.13.5</td>
<td>Expenditure for Legal Services by Public Body Relating to the Open Meeting Law</td>
</tr>
<tr>
<td>7.13.6</td>
<td>Removal From Office</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Form 7.1</th>
<th>Disclosure Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form 7.2</td>
<td>Notice of Public Meeting of a Public Body</td>
</tr>
<tr>
<td>Form 7.3</td>
<td>Notice of Public Meeting of a Subcommittee or Advisory Committee of a Public Body</td>
</tr>
<tr>
<td>Form 7.4</td>
<td>Notice of Regular Meetings of a Public Body</td>
</tr>
<tr>
<td>Form 7.5</td>
<td>Notice of Meeting and Possible Executive Session of a Public Body</td>
</tr>
<tr>
<td>Form 7.6</td>
<td>Notice of Combined Public Meeting and Executive Session</td>
</tr>
</tbody>
</table>

Revised 2012
Form 7.7  Sample Notice and Agenda of Public Meeting and Executive Session
Form 7.8  Certification of Posting of Notice
Form 7.9  Special Notice of Emergency Meeting
Form 7.10  Minutes of Public Meeting
Form 7.11  Quorum
Form 7.11  Minutes of Executive Session
Form 7.12  Notice of Action to be Ratified
Form 7.13  Employee Notice of Executive Session
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 application of the Open Meeting Law to the day-to-day operations of state officers, bodies, and agencies. This Chapter shall be conspicuously posted on the Secretary of State's website for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies. A.R.S. § 38-431.01(G). Individuals elected or appointed to public office shall review this Chapter at least one day before taking office. Id.

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 law. Anyone faced with a situation not specifically addressed in this Chapter should consult their 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 has been amended several times since its enactment. For a detailed discussion of the early history of the Open Meeting Law through 1975, see Ariz. Att'y Gen. Op. 75-7.

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 narrowly construing the Open Meeting Law, the Legislature reiterated its policy by adding A.R.S. § 38-431.09. That statute now provides:

\[
\text{It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided.}
\]
Toward this end, any person or entity charged with the interpretation of this article shall construe any provision of this article in favor of open and public meetings.

A.R.S.§ 38-431.09(A). In keeping with this expressed intent, any uncertainty under the Open Meeting Law should be resolved in favor of openeness in government. Any question whether the Open Meeting Law applies to a certain public body likewise should be resolved in favor of applying the law.

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(6) as follows:

"Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember 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, the public body.

This definition specifically includes public bodies of all political subdivisions. A political subdivision is defined in A.R.S.§ 38-431(5) to include "all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts."

The definition of public body encompasses five basic categories of public bodies: 1) boards, commissions, and other multimember 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. See A.R.S.§ 38-431(6).

7.3.2 Boards and Commissions. All boards and commissions and other multimember 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. See A.R.S.§ 38-431(6). The multimember governing body must be created by law or by an official act pursuant to some legal authority. See id. 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

The Open Meeting Law applies only to multimember bodies and does not apply to the deliberations and meetings conducted by the single head of an agency. See Ariz. Att’y Gen. Op. I92-007, 75-7. Accordingly, the director of a department is not subject to the Open Meeting Law when meeting with staff members 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. See A.R.S.§ 38-431(5), (6). For example, the Board of Directors of the Phoenix Civic Improvement Corporation falls into this category. The Open Meeting Law does not apply, however, to a private non-profit hospital association that has a board of directors elected by the electorate of the hospital district. Prescott Newspapers, Inc. v. Yavapai Cnty. Hosp. Ass’n, 163 Ariz. 33, 785 P.2d 1221 (App. 1989). See Ariz. Att’y Gen. Op. I07-001.

7.3.4 Quasi-Judicial Bodies. The Open Meeting Law defines a quasi-judicial body as "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(7). This definition was added by the Legislature in 1978 to reverse the Arizona Supreme Court's decision in Ariz. Press Club, Inc. v. Ariz. Bd. of Tax Appeals, 113 Ariz. 545, 558 P.2d 697 (1976), which held that the Open Meeting Law did not apply to bodies conducting quasi-judicial functions, such as license revocation proceedings. See Ariz. Att'y Gen. Op. 78-245. The Arizona Board of Tax Appeals and similar quasi-judicial bodies are now expressly covered by the Open Meeting Law. A.R.S.§ 38-431(6), (7).


7.3.5 Advisory Committees. Advisory committees are subject to all of the requirements of the Open Meeting Law. A.R.S. § 38-431.01(A), (B). An advisory committee is defined as any group

officially established, on 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 Ariz. Att'y Gen. Op. I92-007; Section 7.3.2.

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. A.R.S. § 38-431.01(A). 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(6). 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. See Ariz. Att'y Gen. Op. I80-202.

7.4 Government Bodies and Proceedings Not Covered by the Open Meeting Law. The Legislature has determined that certain public bodies need not comply with all or portions of the Open Meeting Law in particular circumstances. This section identifies some of those limited exceptions.

7.4.1 Judicial Appointment Commissions. The Commissions on Appellate and Trial Court Appointments and the Commission on Judicial Qualifications are expressly exempt from the Open Meeting Law. A.R.S. § 38-431.08(A)(3).

7.4.2 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(7), -431.08(A)(1).

7.4.3 The Legislature. Meetings of legislative conference committees must be open to the public; however, the committees are exempted from all other requirements of the Open Meeting Law. A.R.S. § 38-431.08(A)(2). The Open Meeting Law does not apply to the activities of a political caucus of the Legislature. Id. § (A)(1); cf. Ariz. Att'y Gen. Op. I83-128. The Open Meeting Law 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 or to allow standing or conference committees to meet through technological devices rather than in person. A.R.S. § 38-431.08(D).

7.4.4 Student Disciplinary Proceedings. Actions concerning the "discipline, suspension or expulsion of a pupil" are not subject to the Open Meeting Law. A.R.S. § 15-
This same statute, however, prescribes the procedures that the school board must follow in handling these matters.

### 7.4.5 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.

### 7.4.6 Hearings Held in Prison Facilities

Hearings held by the Board of Pardons and Paroles in a prison facility are subject to the Open Meeting Law, but the Director of the State Department of Corrections may prohibit certain individuals from attending such hearings because they pose a serious threat to the safety and security of others or the prison. Other conditions on attendance, such as signing an attendance log and submitting to a reasonable search, may be imposed as well. A.R.S. § 38-431.08(B).

### 7.4.7 Board of Fingerprinting

Good cause exception hearings conducted by the Board of Fingerprinting pursuant to A.R.S. § 41-619.55 are exempt from the Open Meeting Law. A.R.S. § 38-431.08(A)(4).

### 7.4.8 Homeowners Associations

Because they are not governmental "public bodies," homeowners associations are not covered by the Open Meeting Law. Ariz. Att'y Gen. Op. 97-012. They do, however, have to comply with separate notification requirements. Id. Those requirements must be enforced privately because the Attorney General and County Attorneys have no jurisdiction over such matters. For more information on the requirements of homeowners associations, see A.R.S. § 33-1801 et seq.

### 7.5 The Actions and Activities Covered by the Open Meeting Law

#### 7.5.1 Generally

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). All legal action of public bodies shall occur during a public meeting. Id. A meeting is defined as "the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4). The definition of meeting was modified by the Arizona Legislature in 2000 to prohibit a quorum of a public body from secretly communicating through technological devices, including, for example, facsimile machines, telephones, texting, and e-mail.

All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that 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. Att'y Gen. Ops. 75-8, I79-4. See also A.R.S. §§ 38-431.01(A), -431(3) and Ariz.
Att'y Gen. Op. 105-004. 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. It does not matter what label is placed on a gathering. It may be called a "work" or "study" session, or the discussion may occur at a social function. Ariz. Att'y Gen. Op. 179-4. 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. The Open Meeting Law, however, does not prohibit a member of a public body from voicing an opinion or discussing an issue with the public either at a venue other than a public meeting of the body, or through media outlets or other public broadcast communications or technological means, so long as the "opinion or discussion is not principally directed at or directly given to another member of the public body," and "there is no concerted plan to engage in collective deliberation to take legal action." A.R.S. § 38-431.09(B); Ariz. Att'y Gen. Op I07-013.

7.5.2 Circumvention of the Open Meeting Law. 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 violate that law. See Ariz. Att'y Gen. Op. 75-8; Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision. Public officials should refrain from any activities that may undermine public confidence in the public decision making process established in the Open Meeting Law, including actions that may appear to remove discussions and decisions from public view.

For example, Board members cannot use email to circumvent the Open Meeting Law requirements. See Ariz. Att'y Gen. Op. 105-004 at 2. "[E]ven if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a 'meeting.' See Del Papa v. Bd. of Regents of Univ. and Cmty. Coll. Sys. Of Nev., 114 Nev. 388, 393, 956 P.2d 770, 774 (1998) (rejecting the argument that a meeting did not occur because the board members were not together at the same time and place.) Additionally, "[w]hen members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations, or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technical devices under the [Open Meeting Law]." See Ariz. Att'y Gen. Op. 105-004 at 1. This may true even if none of the members of the public body respond to the email. Id. at 2-3. If the one-way communication proposes legal action, then it would violate the Open Meeting Law. Id. However, other one-way communications, with
no further exchanges, are not per se violations, and further examination of the facts and circumstances is necessary to determine if there is a violation. *Id.* at 3.

### 7.5.3 Applicability to Staff Members and Others.

The Open Meeting Law further provides that members of public bodies shall not knowingly direct any staff member to communicate in violation of the Open Meeting Law. A.R.S. § 38-431.01(H). People knowingly aiding, agreeing to aid or attempting to aid another person in violating the Open Meeting Law can be held liable for civil penalties, attorneys' fees, and costs pursuant to A.R.S. § 38-431.07(A). See Sections 7.12.3 and 7.12.4. Hence, staff members, representatives, citizens and others should take steps to ensure they are not acting in a manner to commit a violation or subject themselves to liability.

### 7.6 Notice of Meetings.

#### 7.6.1 Generally.

The Open Meeting Law requires at least 24 hours advance notice of all meetings to the public body and to the general public. Notice makes it possible for the public to attend public meetings by informing them of when and where to go, and how to get information regarding the matters under consideration. Arizona courts have emphasized the importance of sufficient notice of meetings. The Arizona Court of Appeals explained, "The notice provisions in the open meeting law are obviously designed to give meaningful effect to provisions such as A.R.S. §§ 38-431.01(A) and 38-431.09. The goal of exposing the public decision-making process to the public itself could be significantly, if not totally thwarted, in the absence of mandatory notice provisions and their enforcement." *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985 (Ariz. App. 1982).

#### 7.6.2 Notice to Members of the Public Body.

Notice of all meetings, including executive sessions, must be given to the members of the public body. A.R.S. § 38-431.02(C). Generally, this requirement is met by mailing or hand-delivering a copy of the notice to each member of the public body.

#### 7.6.3 Notice to the Public.

Notice of all meetings, including executive sessions, must be given to the public. A.R.S. § 38-431.02. Giving public notice is a two step process. *Id.*

#### 7.6.3.1 Disclosure Statement.

The first step is for the public body to conspicuously post a disclosure statement identifying the physical and electronic locations where public notices of meetings will be displayed. A.R.S. § 38-431.02(A). See Form 7.1. Public bodies of the State, counties, school districts, and governing bodies of charter schools must post the disclosure statement on their websites. *Id.* § (A)(1)-(2). Special districts governed by Title 48, A.R.S., must post the required disclosure statement on their own website or may file it with the Clerk of the Board of Supervisors. *Id.* § (A)(3). Public bodies of cities and towns must post the required information on their own websites or on the website of an association of towns and cities. *Id.* § (4). The notification location identified
in the statement must be a place to which the public has reasonable access. The location should have normal business hours, should not be geographically isolated, should not have limited access and should not be too difficult to find.

7.6.3.2 Public Notice of Meetings. Once the disclosure statement has been filed or posted, the public body must give notice of each of its meetings by posting a copy of the notice on its website as well as at the location identified in the disclosure statement. A.R.S. § 38-431.02(A). See Forms 7.2, 7.3, 7.4. Public bodies shall also give "additional public notice as is reasonable and practicable as to all meetings." Id. § (A)(1)(a). Various public bodies fulfill this obligation to provide "additional notice" by providing news releases concerning proposed meetings, mailing notices to those asking to be informed of meetings, including the date and time of such meetings in their newsletters and other publications, and making announcements on public access television. If there are technical problems that temporarily affect the online meeting notifications, and all other public notice requirements are met, then the meeting can convene as scheduled. Id. § (A)(1)(b).

In addition to complying with the requirements of the Open Meeting Law, the notice should conform with the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 - 12213 (Supp. 1992). See Sections 15.25.2 - 15.25.5. Public bodies should include a statement such as the following in any notices that they issue: "Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name of designated agency contact person] at [telephone number and TDD telephone number]. Requests should be made as early as possible to allow time to arrange the accommodation."

7.6.4 Contents of the Notice. Generally, the notice should include information identifying the public body and the date, time, and place of the meeting. See Forms 7.2, 7.3. 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 Form 7.7 (Sample Notice and Agenda). In addition, the notices of public meetings and notices of executive sessions must contain an agenda of the matters to be considered by the public body at the meeting or information on how the public may obtain a copy of such an agenda. A.R.S. § 38-431.02(G). For a complete discussion of the agenda requirements, see Section 7.7. 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; Form 7.12.

7.6.5 Time for Giving Notice. As a general rule, a meeting may not be held without giving the required notice at least twenty-four hours before the meeting. A.R.S. § 38-431.02(C). For purposes of the statute, the twenty-four period excludes Sundays and holidays. Id. Saturdays are included in the period if the public has access to the physical and electronic posted locations. Id. Of course, the best practice is for public bodies to give as much notice as possible.
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 to the circumstances." \textit{Id.} § (D). An actual emergency exists when, due to unforeseen circumstances, immediate action is necessary 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' written notice to an employee to be discussed in executive session. A.R.S. § 38-431.03(A)(1); see Sections 7.7.9 and 7.9.4.

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. A.R.S. § 38-431.05(B)(4); 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). 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, before 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. \textit{Id.} Notice of the resumption of a meeting must comply with the agenda requirements respecting the matters to be addressed when resumed. \textit{Id.} § (G). 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. 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. If the meeting will not reconvene for more than 24 hours, a new meeting notice and agenda is recommended.

\textbf{7.6.6 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. A.R.S. § 38-431.02(F); see Form 7.4. The notice must specify the period for which the notice is applicable. \textit{Id.} 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).

\textbf{7.6.7 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 7.5. This provision requires that the notice specify the numbered paragraph of subsection (A) of A.R.S. § 38-431.03 that 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 discussing the purchase or lease of real property must cite in its notice "A.R.S. § 38-431.03(A)(7)." 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. A.R.S. § 38-431.02(G); see Section 7.7.3.

In the case of an executive session concerning personnel matters, the public body must give written notice to the affected officer, appointee, or employee in addition to the public notice described above. A.R.S. § 38-431.03(A)(1); see Section 7.9.4; Form 7.13. Such written notice must be provided not less than 24 hours before the scheduled meeting.

Many public bodies do not know whether they will have any legal questions on matters on the agenda until the discussion occurs. The Attorney General has opined that public bodies may provide with their notices and agendas a statement that matters on the public meeting agenda may be discussed in executive session for the purpose of obtaining legal advice thereon, pursuant to A.R.S. § 38-431.03(A)(3). Ariz. Att’y Gen. Op. I90-19. An example of such a statement is "The Board may vote to hold an executive session for the purpose of obtaining legal advice from the Board’s attorney on any matter listed on the agenda pursuant to A.R.S. § 38-431.03(A)(3)." Similar statements are not sufficient for other types of executive sessions. See Section 7.7 for further discussion.

7.6.8 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 7.6.6 and 7.6.7, the public body may choose 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 7.6 and the sample notice and agenda, Form 7.7.

7.6.9 Maintaining Records of Notice Given. Each public body should keep a record of its notices, including a copy of each notice that 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 7.8.

7.7 Agendas.

7.7.1 Generally. In addition to notice of the time, date, and place of the meeting, the public body must provide an agenda of the matters to be discussed, considered, or decided at the meeting. A.R.S. § 38-431.02(G). 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(A). 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 generic agenda items such as "personnel," "new business," "old business," or "other matters" unless the specific matters or items to be discussed are separately identified. See *Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988). The degree of specificity of 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 Form 7.7 (Sample Notice and Agenda).

If it is likely that the public body will 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 vote to hold an executive session for the purpose of obtaining legal advice from the Board's attorney on the approval of pesticides for application within ¼ mile of a school 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." A.R.S. § 38-431.02(I). The description must amount to more than just a recital of the statutory provisions authorizing the executive session, but should not contain any information that "would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee or compromise the attorney-client privilege." *Id.* In preparing executive session 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 board's consideration of charges against an employee might needlessly harm the employee's reputation or compromise the employee's privacy interests, 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 the employee's 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. A.R.S. § 38-431.02(G); see Forms 7.2 - 7.4, 7.6, 7.7.

Because both the public notice and the agenda 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 Form 7.7 (Sample Notice and Agenda).

However, when the public notice is issued well in advance of a meeting, as in the case of notice of regularly scheduled meetings, see Section 7.6.6, it may be more appropriate to state how the public may obtain a copy of the agenda and distribute it accordingly.

7.7.5 Consent Agendas. Public bodies may use "consent agendas" so long as certain requirements are met. Consent agendas are typically used as a time-saving device when there are certain items on the agenda which are unlikely to generate controversy and are ministerial in nature. Some examples are approval of travel requests and approval of minutes. Public bodies often take one vote to approve or disapprove the consent agenda as a whole. When using a consent agenda format for some of the items on a meeting agenda, public bodies should fully describe the matters on the agenda and inform the public where more information can be obtained. A good practice is to require that an item be removed from the consent agenda upon the request of any member of the public body. See Form 7.7 (Sample Notice and Agenda).

Public bodies should take caution when using consent agendas. The Arizona Supreme Court has held that taking legal action, including that taken after an executive session, must be preceded by a 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." Karol v. Bd. of Educ. Trustees, 122 Ariz. 95, 98, 593 P.2d 649, 652 (1979). The court also specifically condemned the practice of voting on matters designated only by number, thereby effectively hiding actions from public examination. Id.

7.7.6 Discussing and Deciding Matters Not Listed on the Agenda. 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 cautiously. The "other matters" must in some reasonable manner be "related" to an item specifically listed on the agenda. Thurston v. City of Phoenix, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988).

If a matter not specifically listed on the agenda is brought up during a meeting, the better practice, and the one that 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 and is a true emergency, the public body should consider using the emergency exception described in Section 7.6.9.

However, if action is taken at a meeting on an item not properly noticed, then that particular action violates the Open Meeting Law and is null and void. *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (App. 2001); A.R.S. § 38-431.05(A). The public body may ratify the action pursuant to A.R.S. § 38-431.05(B), although the violation may still subject the public body to the penalties described in A.R.S. § 38-431.07(A). Any other actions that were taken at the meeting and were properly noticed are not void. *Karol*, 122 Ariz. at 98, 593 P.2d at 652; Ariz. Att'y Gen. Op. I08-001.

**7.7.7 Calls to the Public.** In 2000, the Legislature clarified the limitations on open calls to the public during public meetings. A.R.S. § 38-431.01(H) now provides that a public body may make an open call to the public to allow individuals to address the public body on any issue within the jurisdiction of the public body. Members of the public body may not discuss or take action on matters raised during the call to the public that are not specifically identified on the agenda. *Id.* Public body members may, however, respond to criticism made by those who have addressed the public body, ask staff to review a matter, or ask that a matter be put on a future agenda. *Id.* See also Ariz. Att'y Gen. Op. I99-006.

The best practice is to include language similar to the following on the agenda to explain in advance the reason members of the public body cannot respond to topics brought up during the call to the public that are not on the agenda: "Call to the Public: This is the time for the public to comment. Members of the Board may not discuss items that are not specifically identified on the agenda. Therefore, pursuant to A.R.S. § 38-431.01(H), action taken as a result of public comment will be limited to directing staff to study the matter, responding to any criticism or scheduling the matter for further consideration and decision at a later date."

**7.7.8 Current Event Summaries.** The Open Meeting Law allows the chief administrator, presiding officer or a member of a public body to present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that the summary is listed on the agenda and that the public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action. A.R.S. § 38-431.02(K). Public bodies should limit the use of this provision to appropriate situations and should strive to provide as much advance information as possible to the public.

**7.7.9 Emergencies.** 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. A.R.S. § 38-431.02(D). See Section 7.6.5 for a discussion of what constitutes an actual emergency.
To use the emergency exception, the public body must do several things. First, the public body must give "such notice as is appropriate to the circumstances" and must "post a notice within twenty-four hours declaring that an emergency session has been held" and setting forth the same information as is required in an agenda for a regular meeting. A.R.S. § 38-431.02(D); see Form 7.9.

Next, prior to the emergency discussion, consideration, or decision, the public body must announce in a public meeting the reasons necessitating the emergency action. A.R.S. § 38-431.02(J). 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. Id.

Finally, the public body must place in the minutes of the meeting a statement of the reasons for the emergency. Id. 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).

7.7.10 Changes to 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. Att'y Gen. Op. I79-45. Changes in the agenda within twenty-four hours of the meeting may be made only in case of emergency. Ariz. Att'y Gen. Op. I79-192; see Section 7.7.9.

7.8 Minutes. Minutes must be taken of all public meetings and executive sessions.

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. A.R.S. § 38-431.01(B); see Forms 7.10, 7.11. The minutes or a recording of a public meeting must be available for public inspection within three working days after the meeting. A.R.S. § 38-431.01(D). Public bodies concerned about distributing minutes before they have been officially approved at a subsequent meeting should mark the minutes "draft" or "unapproved" and make them available within three working days of the meeting. 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 7.10. The minutes of an executive session are confidential and may not be disclosed to anyone except certain authorized persons. A.R.S. § 38-431.03(B); see Section 7.8.4. To ensure confidentiality, minutes of executive sessions should be stored separately from regular session minutes to avoid inadvertent disclosure.

7-14 Revised 2012
The approved minutes of all city or town council meetings must be posted on the city’s website within two working days of their approval. A.R.S. § 38-431.01(E)(2). In no event should minutes be withheld from the public pending approval. Minutes must be reduced to a form that is readily accessible to the public. See A.R.S. § 38-431.01(D). A public body of a city or a town with a population exceeding 2,500 people shall, within three working days after any meeting, post on their website a statement showing legal actions taken by the public body or any recordings made during the meeting. A.R.S. § 38-431.01(E)(1). Posted statements and recordings shall remain accessible on the website for at least one year after the meeting. Id. § (J). In addition, any recordings and minutes are public records subject to record retention requirements.

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." A.R.S. § 38-431.01(B)(1).

2. "The members of the public body recorded as either present or absent." Id. § (B)(2).

3. "A general description of the matters [discussed or] considered." Id. § (B)(3). Minutes must contain information regarding matters considered or discussed at the meeting even though no formal action or vote was taken with respect to the matter. See id. § (B)(4).

4. "An accurate description of all legal actions proposed, discussed or taken, and the names of persons who proposed each motion." Id. 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 of or against the motion. In any case, it is wise for the minutes to 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. Id.

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 to permit the public to investigate further the background or specific facts of the decision. See Section 7.7.5; Karol, 122 Ariz. 95, 593 P.2d 649.
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. A.R.S. § 38-431.02(J); see Sections 7.6.5 and 7.7.9.

8. If a prior act was ratified, the minutes must contain a copy of the disclosure statement required for ratification. A.R.S. § 38-431.05(B)(3); see Section 7.11.2; Form 7.10.

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." A.R.S. § 38-431.01(B)(1), (C).

2. "The members of the public body recorded as either present or absent." ld. § (B)(2), (C).

3. "A general description of the matters considered." ld. § (B)(3), (C); see Section 7.8.2(3).

4. An accurate description of all instructions given to attorneys or designated representatives pursuant to A.R.S. § 38-431.03(A)(4), (5) and (7). See Sections 7.9.7, 7.9.8 and 7.9.10.

5. A statement of the reasons for emergency consideration of any matters not on the agenda. See A.R.S. § 38-431.02(J); Section 7.8.2(7).

6. Such other information as the public body deems appropriate. For example, the public body might record in its minutes that those present were advised that the information discussed in the session and the session minutes are confidential. See Form 7.11.

"A party who asserts that a public body violated the open meeting laws has the burden of proving that assertion." Tanque Verde Unified Sch. Dist. No. 13 of Pima County v. Bernini, 206 Ariz. 200, 205, 76 P.3d 874, 879 (App. 2003). However, Arizona courts have held that once a complainant alleges facts from which a reasonable inference may be drawn supporting an Open Meeting Law violation, the burden of proof immediately shifts to a public body to prove that an affirmative defense or exception to the Open Meeting Law authorized an allegedly inappropriate executive session. Fisher v. Maricopa County Stadium Dist., 185 Ariz. 116, 122, 912 P.2d 1345, 1351 (App. 1995). See also Tanque, 206 Ariz. 200 at 205, 76 P.3d 874 at 881. Hence, the best practice is for public bodies to tape record or keep detailed minutes of executive sessions in order to ensure that they are prepared to meet their burden of proof in the event a lawsuit is filed.
**7.8.4 Confidentiality of Executive Session Minutes.** The minutes of an executive session and all discussions that take place at an executive session are confidential and may not be disclosed to anyone, A.R.S. § 38-431.03(B), except that they may be disclosed to the following people:


2. Any officer, appointee, or employee who was the subject of discussion at an executive session authorized by A.R.S. § 38-431.03(A)(1) may see those portions of the minutes directly pertaining to them. A.R.S. § 38-431.03(B)(2); see Section 7.9.4.

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.


6. The Attorney General or County Attorney when investigating alleged violations of the Open Meeting Law. A.R.S. § 38-431.03(B)(4).

7. The court, for purposes of a confidential inspection where an open meeting violation has been alleged. 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. A.R.S. § 38-431.03(C). Public bodies should maintain executive session minutes in a secure file separate from the public meeting minutes to guard against accidental disclosure.

**7.9 Executive Sessions.** Section 38-431.03, A.R.S., contains an exception to the general requirement of the Open Meeting Law that all meetings must be open to the public. That Section provides seven specific instances in which a public body may discuss matters in an executive session. An executive session is defined as "a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in [A.R.S. § 38-431.03]." A.R.S. § 38-431(2). An executive session may be convened solely for the purpose of discussing matters and, in limited instances,
giving instructions to attorneys and designated representatives. A.R.S. § 38-431.03(D). No legal action may be taken in the executive session.  *Id.*

Arizona courts have strictly construed the seven authorized executive session topics because their legislative charge is to "promote openness in government, not to expand exceptions which could be used to obviate the rule." See *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995). Thus, unless the proposed discussion plainly falls within one of the Open Meeting Law executive session topics or is specifically authorized by the public body’s enabling legislation, discussion should take place only in a public meeting.

In litigation, the burden of proof is initially on the complainant to "allege facts from which a reasonable inference may be drawn supporting an Open Meeting Law violation." *Id.*, 185 Ariz. at 122, 912 P.2d at 1351. The burden then immediately shifts to the public body to prove that an affirmative defense or exception to the Open Meeting Law authorized the executive session. *Id.*

7.9.1 Deciding to Go Into Executive Session. 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.

7.9.2 Executive Session Requirements. Once the majority of members of a public body have voted to hold an executive session, the chairman of the public body should ask the public to leave and to take with them all materials such as briefcases and backpacks to ensure that no recording devices have been left in the room. All persons must leave the meeting except the members of the public body and those individuals whose presence is reasonably necessary for the public body to carry out its executive session responsibilities. A.R.S. § 38-431(2). The chairman should remind all present that the business conducted in executive sessions is confidential pursuant to A.R.S. § 38-431.03(C).

7.9.3 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 categories are discussed in Sections 7.9.4 - 7.9.10. 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 not prohibited by any other statutory provision and government interests are not threatened, a public body may choose to conduct its discussions in a public setting.
7.9.4 Personnel Matters. The discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, discipline, 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 (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 of applicants for employment or appointment even though the applicants 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. A.R.S. § 38-431.03(A)(1). 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 written notice of the proposed executive session. Id. 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 whether to have the matters discussed in a public meeting. Id. In addition, the written 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 meeting. Id.; see Ariz. Att'y Gen. Op. I79-49. See also Form 7.13. There is no emergency exception to the requirement that an affected officer, appointee, or employee receive at least twenty-four hours' notice. However, the public body can discuss personnel matters in a public meeting with less than twenty-four hours' notice if an actual emergency exists. A.R.S. § 38-431.02(D). See Sections 7.6.5 and 7.7.9.

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. Whether he attends or not, 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.R.S. § 38-431.03(B)(2).

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.

Public bodies should take care to ensure that the scope of executive sessions for personnel discussions is limited to true personnel matters. The Attorney General has
opined that the Open Meeting Law prohibits public bodies from conducting in executive sessions lengthy information gathering meetings that explore the operation of public programs under the guise of conducting a personnel evaluation. Only the actual evaluation - discussion or consideration of the performance of the employee - may take place in an executive session. Ariz. Att'y Gen. Op. I96-012. A public body that wishes to discuss or consider an employee’s evaluation in executive session, pursuant to A.R.S. § 38-431.03(A)(1), should adopt a bifurcated process that would permit the public body to gather information about public programs at a public meeting, while allowing the public body to enter executive session to discuss or consider the actual evaluation. Ariz. Att'y Gen. Op. I96-012.

Similarly, a public body may not discuss a class of persons in executive session under the Personnel Matters provision. For instance, a public body may not use this executive session provision to discuss a potential reduction in force. Each employee who will be discussed in executive session must get the notice as required by A.R.S. § 38-431.03(A)(1).

7.9.5 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 specifically includes situations in which the public body is receiving and discussing "information or testimony that is specifically required to be maintained as confidential by state or federal law." Id. This provision allows the use of an executive session whenever the public body intends to discuss or consider matters contained in records that are confidential by law. See Ariz. Att'y Gen. Ops. I90-058, I87-131. However, when confidential matters can be adequately safeguarded, the discussion may take place during a public meeting. Cf. Ariz. Att'y Gen. Op. I87-038 (medical records). 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 handbook. For example, to preserve confidentiality, preliminary audit reports of state agencies prepared by the Auditor General are confidential and should be discussed by the public body in executive session. Ariz. Att'y Gen. Op. I80-035. Similarly, complaints against licensees that are investigated by a public body may be discussed in executive session. Ariz. Att'y Gen. Op. I83-006. In 2000, the Legislature revised the statute to allow public bodies to take testimony in executive sessions in certain situations. Public bodies should ensure that state or federal law requires that the public body maintain confidentiality of the information it receives before convening an executive session under A.R.S. § 38-431.03(A)(2). Written materials, however, do not become confidential merely because they are discussed in executive session.

7.9.6 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). For this exemption to apply, the attorney giving the legal advice must be the attorney for the public body. Id. 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.

This provision authorizes consultations between a public body and its attorney. 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 communications between lawyer and 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. See City of Prescott v. Town of Chino Valley, 166 Ariz. 480, 803 P.2d 891 (1990). Discussion between the members of the public body about what action should be taken is beyond the realm of legal advice, and such discussions must be held in public session.

7.9.7 Litigation, Contract Negotiations, and Settlement Discussions. A public body may hold an executive session for the purpose of "[d]iscussion 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 regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation." A.R.S. § 38-431.03(A)(4). This provision allows consideration and instruction only - it does not allow a public body to conduct contract negotiations or settlement discussions in an executive session.

This provision allows a public body to give its attorneys instructions on how they should proceed in contract negotiations, pending or contemplated litigation involving the public body, and settlement discussions. For example, the public body might authorize its attorney to settle a lawsuit on the most favorable terms 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.

This provision is unique in that it permits public bodies to "instruct" their attorneys. In these limited situations, the public body must be able to discuss and arrive at some consensus on its position before it instructs its legal counsel. Executive session minutes must contain an accurate description of all instructions given. A.R.S. § 38-431.01(C). The best practice is for a public body, upon return to the open session, to vote to authorize its attorney to act "as instructed in the executive session." After the attorney takes the action authorized and the need for confidentiality has passes, the public body must formally approve of the action in open session.

Like the provision that allows legal advice to be given in executive session, this provision requires that the attorney of the public body be present at the executive session.
Similarly, the discussion in Section 7.9.6 of the definition of “attorney for the public body” applies with equal force to this Section.

7.9.8 Discussions with Designated Representatives Regarding Salary Negotiations. A public body may hold an executive session for the purpose of "[d]iscussions 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." A.R.S. § 38-431.03(A)(5). This provision permits a public body, in executive session, to consult and discuss with its representatives its position on negotiating salaries or compensation paid in the form of fringe benefits and to instruct representatives on how they should deal with the employee organizations. It does not authorize an executive session for purposes of meeting with the employees’ 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.

This provision also allows the public body to "instruct" its representatives. The discussion in Section 7.9.7 of the practice of confirming instructions in public session and the minute-taking requirements applies with equal force to this Section.


This provision also permits a city or town, or its designated representatives, to enter into executive session with "members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town." A.R.S. § 38-431.03(A)(6). This is the only type of executive session in which negotiations with another party can take place.

7.9.10 Purchase, Sale or Lease of Real Property. A public body may meet in executive session to discuss and consult with its representatives concerning negotiations for the purchase, sale, 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. For example, a school district violates open meeting laws by choosing a site for a proposed high school in executive session. Tanque, 206 Ariz. at 204-5, 76 P.3d at 878-9. This provision permits the public body to instruct its representatives regarding the purchase, sale or lease of real property. For example, the public body can authorize its representative to negotiate up to a certain amount. Of course, the final contract must be approved by the public body in a public meeting.
This provision also allows the public body to "instruct" its representatives. The discussion in Section 7.9.7 of the practice of confirming instructions in public session and the minute-taking requirements applies with equal force to this Section.

7.9.11 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 vote or make a final decision in the executive session, but rather must reconvene in a public meeting for purposes of taking the binding vote or making final decisions. For example, "[a] decision to appeal transcends 'discussions or consultation' and entails a 'commitment' of public funds. Therefore, once [a] Board [has] finished taking privately discussing the merits of appealing, the open meeting statutes require that the board members meet in public for the final decision to appeal." Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd., 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (App. 2001). 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). No motion or vote is taken to adjourn the executive session; the chair is responsible for adjourning the executive session and reconvening the public session.

7.10 Public Access to Meetings.

7.10.1 Public Participation and Access. The public must be allowed to attend and listen to deliberations and proceedings taking place in all public meetings, A.R.S. § 38-431.01(A); however, 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. Att'y Gen. Op. 78-1. 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. See also Section 7.7.7 for a discussion of the authorization (but not requirement) for public bodies to use an open call to the public.

The public body must provide the public with access to all public meetings. See A.R.S. § 38-431.01(A). This requirement is not met if the public body invokes any procedure or device that 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 to which the public does not have access, such as private clubs, or at an unreasonable time. 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).

In addition to complying with the Open Meeting Law, the notice and accommodations should conform with the provisions of the Americans with Disabilities Act.
(ADA), 42 U.S.C. §§ 12101 - 12213 (Supp. 1992). See Section 15.22; see also § 7.6.3.2 (notice requirements relating to reasonable accommodations).

7.10.2 Remote Conferencing. 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 or internet conference if the practice is approved by the public body and is not prohibited by statutes applicable to meetings of the public body. Ariz. Att'y Gen. Ops. I08-008, I91-033, I83-135. This practice presents several practical and legal problems and should be used only where there are no reasonable alternatives to presence at the meeting.

A public body must comply with the following guidelines 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, video or internet communications. In the appropriate notice, insert the following after the first sentence: "Members of the [name of public body] will attend either in person or by telephone, video or internet conferencing."

2. The public meeting place where the public body normally meets should have facilities that permit the public to observe and hear all telephone, video or online communications.

3. The public body should develop procedures for clearly identifying all members participating by telephonic, video or internet 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.

7.10.3 Record of the Proceedings. A public body of a city or town with a population of more than 2,500 people must post on its website either a recording of the meeting or a statement of the legal actions taken during the meeting. A.R.S. § 38-431.01(E)(1). This statement must be posted within three working days of the meeting and must remain accessible on the website for at least one year thereafter. ld., (J). Subcommittees and advisory committees have ten working days after the meeting to post the recording or statement. ld., (E)(3).

"All or any part of a public meeting . . . may be recorded by any person in attendance by means of a tape recorder or camera or other means of sonic reproduction." A.R.S. § 38-431.01(F). A public body may prohibit or restrict such recordings only if they actively interfere with the conduct of the meeting. ld.
7.11 Quorum. Public bodies frequently struggle with questions about quorum. Arizona statutes generally define a quorum as a majority of the members of a board of commission. A.R.S. § 1-216. This definition applies in the absence of a more specific definition. Vacant positions do not reduce the quorum requirement.

7.11.1 Effect of Disqualification on the Quorum Requirement. Board members may be disqualified from voting on a particular matter for a variety of reasons, most commonly because they have a conflict of interest. The disqualification of a board member may make it difficult for the public body to obtain quorum. 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 the member is disqualified. See Croaff v. Evans, 130 Ariz. 353, 358, 636 P.2d 131, 136 (App. 1981).

For example, if four members of a seven member board are required for a quorum and only four members are present at a board meeting to discuss several matters, the board could not discuss a particular matter in which one of the four members has been disqualified, because for purposes of discussing or deciding that matter, the necessary quorum of four members is not present. If 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. 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, 89 P.2d 136, 140 (Cal. App. 1939).

7.12 Ratification.

7.12.1 Generally. A public body may ratify action previously taken in violation of the Open Meeting Law. See A.R.S. § 38-431.05(B). 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 violated 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, to ratify its prior action.
Ratification must take place “within 30 days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.” A.R.S. § 38-431.05(B)(1). A judicial determination that the public body took legal action in violation of public meeting laws triggers the thirty-day period. Tanque, 206 Ariz. at 208-210, 76 P.3d at 882-884. However, it is not triggered by letters from attorneys notifying the board of their intent to challenge the legal action or by filing a lawsuit. Id. at 883.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for sanctions under the Open Meeting Law, such as civil penalties and attorney’s fees.

7.12.2 Procedure for Ratification. The Open Meeting Law provides a detailed procedure for ratification. A.R.S. § 38-431.05(B). 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. Ratification must take place within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.

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 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 7.12.

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.

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.

7.13 Sanctions for Violations of the Open Meeting Law.

7.13.1 Nullification. 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. A.R.S. § 38-431.05(A). The procedures for ratification are described in Section 7.11.2.

The Arizona Supreme Court, however, has held that legal actions taken in violation of the Open Meeting Law are voidable at the discretion of the court. *Karol*, 122 Ariz. at 97, 593 P.2d at 651. 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." *Id.*, 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 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 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 at which it took a formal vote as its "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 (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.

7.13.2 Investigation and Enforcement. The 2000 Legislature enacted substantial revisions to the Open Meeting Law, including extensive changes to the investigation and enforcement provisions of the law. The Attorney General and County Attorneys are authorized to investigate alleged Open Meeting Law violations and enforce the Open Meeting Law. A.R.S. § 38-431.06.

The Open Meeting Law now specifically provides that the Attorney General and County Attorneys shall have access to executive session minutes when they are investigating alleged violations of the Open Meeting Law. A.R.S. § 38-431.03(B)(4). The Open Meeting Law also provides that disclosure of executive session information (such as disclosure to the Attorney General) does not constitute a waiver of the attorney-client privilege and directs courts reviewing executive session information to protect privileged information. *Id.* § (F).

The investigative authority of the Attorney General and County Attorneys was strengthened by the 2000 Legislature. The Attorney General and County Attorneys may issue written investigative demands to any person, administer oaths or affirmations to any
person for the purpose of taking testimony, conduct examinations under oath, examine accounts, books, computers, documents, minutes, papers and recordings, and require people to file written statements, under oath, of all the facts and circumstances requested by the Attorney General or County Attorney. A.R.S. § 38-431.06(B). If a person fails to comply with a civil investigative demand, the Attorney General or County Attorney may seek enforcement of the demand in Superior Court.

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 to require compliance with or prevent 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.

Additionally, 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.R.S. § 38-431.04. A writ of mandamus is an order of the court compelling a public officer to comply with certain mandatory responsibilities imposed by law.

In 2007, in an effort to increase government awareness and provide the citizens of Arizona an effective and efficient means to get answers and resolve public access disputes, legislation expanded the Arizona Ombudsman-Citizens' Aide Office to provide free services to citizens and public officials regarding public access issues. The duties of the Ombudsman include: preparing materials on public access laws, training public officials, coaching, assisting and educating citizens, investigating complaints, requesting testimony or evidence, conducting hearings, making recommendations, and reporting misconduct. A.R.S. § 41-1376.01.

7.13.3 Civil Penalties. The court may impose a civil penalty not exceeding five hundred dollars against any person for each violation of the Open Meeting Law. A.R.S. § 38-431.07(A). This penalty can be assessed against a person who violates the Open Meeting Law or who knowingly aids, agrees to aid or attempts to aid another person in violating the Open Meeting Law. Id. 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, see id.

7.13.4 Attorney's Fees. The court may also order payment of reasonable attorney's fees to a successful plaintiff in an enforcement action brought under the Open Meeting Law. A.R.S. § 38-431.07(A). 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. Id. However, if the court determines that a public officer violated the Open Meeting Law "with intent to deprive the public of information," the court must assess against that public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating the Open Meeting Law all of the costs and attorney's fees awarded to the plaintiff. Id. As in the case
of an award of civil penalties, the public body may not pay such an award of attorney’s fees assessed against the public officer individually. See id.

**7.13.5 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 the 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).

**7.13.6 Removal From Office.** If the court determines that a public officer violated the Open Meeting Law "with intent to deprive the public of information," the court may remove the public officer from office. A.R.S. § 38-431.07(A).
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, for example, "in the lobby of the State Capitol located at 1700 West Washington, Phoenix, Arizona, and at the press room of the State Senate Building, 1700 West Washington, Phoenix, Arizona. Both locations are open to the public Monday through Friday from 8:00 a.m. to 5:00 p.m. except legal holidays."] 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 __________, 20__.

[name of public body]

By [authorized signature]
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 exact location].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered, or decided. See Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this _____ day of ____________, 20__.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
Form 7.3

Notice of Public Meeting of a Subcommittee or Advisory Committee of a Public Body

Sections 7.6.3, 7.10.1

NOTICE OF MEETING OF THE [NAME OF SUBCOMMITTEE OR ADVISORY 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 meeting open to the public on the [date, time, and exact location].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered or decided. See Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this _____ day of ____________, 20__. 

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
Form 7.4

Notice of Regular Meetings of a Public Body

Sections 7.6.3, 7.6.6, 7.7.4, and 7.10.1

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 [exact location].

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this ____ day of ____________, 20__.

[large blank]

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
Form 7.5

Notice of Meeting and Possible Executive Session of a Public Body

Sections 7.6.8 and 7.10.1

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 exact location] 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, but exclude information that would defeat the purpose of the executive session. See Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four 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 ____________, 20__.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
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 exact location]. As indicated in the agenda, pursuant to A.R.S. § 38-431.03(A) [specific paragraph that justifies the executive session]. 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. See Form 7.7 (Sample Notice and Agenda). 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, but exclude information that would defeat the purpose of 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 hours in advance of the meeting.

Dated this _____ day of ______________, 20__.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
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, 2000, 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 October 19, 1999 Meeting.

III. Committee Reports. (Oral reports of the following committees and discussion thereon.)

1. Computer Committee. Report by the chair 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 with the Commission's attorneys 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 Brown 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.

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.) Any matter on the Consent Agenda will be removed from the Consent Agenda and discussed as a regular agenda item upon the request of any Commission member.

1. Approval of purchase order numbers 1204, 1205, and 1206 for purchase of computer equipment.

2. Approval of travel claims for employees John Q. Smith and Mary M. McGee.

3. Approval of resignation of Daniel Warren and resolution to thank Daniel Warren for ten years of service.

VII. Call to the Public.

This is the time for the public to comment. Members of the Board may not discuss items that are not on the agenda. Therefore, action taken as a result of public comment will be limited to directing staff to study the matter or scheduling the matter for further consideration and decision at a later date.

VIII. Summary of Current Events.

The chief administrator, presiding officer or a member of the board may present a brief summary of current events pursuant to A.R.S. § 38-431.02(K). The Board will not discuss or take action on any current event summary.
IX. Future Meeting Dates and Items for Future Agendas.

The Board may discuss future dates for meetings and direct staff to place matters on future agendas.

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 7th day of January, 2000.

ARIZONA COMMISSION ON THE ENVIRONMENT

Chris Jones
Executive Secretary

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
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].

Dated this _____ day of _____________, 20__.

[name and title of person signing the certificate]
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 exact location].

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 ____________, 20__.

[name of public body]

By [authorized signature]
A public meeting of the [name of public body] was convened on [date, time, and exact location]. 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, making 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), (8).]

Dated this _____ day of ____________, 20__.  

[name of public body]

By [authorized signature]
An executive session of the [name of public body] was convened on [date, time, and exact location]. The [name of public body] voted to go into executive session at a public meeting on [date, time, and exact location]. 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, for example, 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. [Describe all instructions given to attorneys or designated representatives pursuant to A.R.S. § 38-431.03(A)(4), (5) and (7).]

3. [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).]

4. [Include such other information as the public body deems appropriate, including information necessary to establish that executive session was proper and appropriate. See Section 7.8.3(5).]

Dated this _____ day of ____________, 20__.  

[name of public body]

By [authorized signature]
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 exact location].

The purpose of the meeting is to ratify an action of the [name of public body] that may have been taken in violation of the Open Meeting Law. This action involved:

[Describe 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 ____________, 20__.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.
Form 7.13

Employee Notice of Executive Session

Section 7.9.4

[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 exact location] 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*].

Any person with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Very truly yours,

[authorized signature]

* Since the public body must post its notice of either a public meeting or an executive session at least twenty-four hours before the meeting, the deadline for the employee to exercise his or her right to demand a public meeting must be more than twenty-four hours before the meeting.
CHAPTER 8
CONFLICT OF INTEREST

Table of Contents

Section 8.1  Scope of this Chapter
Section 8.2  The Arizona Conflict of Interest Laws
  8.2.1  Purpose of the Conflict of Interest Laws
  8.2.2  Scope of Application
  8.2.3  Public Officers
  8.2.4  Public Employees
  8.2.5  Relatives
Section 8.3  Substantial Interest
Section 8.4  Remote Interests
  8.4.1  Generally
  8.4.2  Nonprofit Corporations
  8.4.3  Landlord/Tenant of a Contracting Party
  8.4.4  Attorney of a Contracting Party
  8.4.5  Nonprofit Cooperative Marketing Associations
  8.4.6  Insignificant Stock Ownership
  8.4.7  Reimbursement of Expenses
  8.4.8  Recipient of Public Services Generally Available
  8.4.9  Relatives of School Board Members
  8.4.10 Interests of Other Agencies

Revised 2011
8.4.11 Class Interests

Section 8.5 Contracts for Supplies or Services

  8.5.1 Contracts Made by Spouses of Public Officers or Employees

Section 8.6 Strict Compliance

Section 8.7 Disclosure of the Interest

Section 8.8 Rule of Impossibility

Section 8.9 Other Conflict of Interest Laws

Section 8.10 Incompatibility of Public Offices

Section 8.11 Representation of Others After Leaving Public Service

Section 8.12 Disclosure or Use of Information Declared Confidential by Law

Section 8.13 Disclosure or Use of Information Made Confidential By Agency Action

Section 8.14 Improper Use of Office for Personal Gain

Section 8.15 Receiving Additional Income for Services

Section 8.16 Sanctions for Violations

  8.16.1 Criminal Penalties

  8.16.2 Forfeiture of Public Office

  8.16.3 Contract Cancellation

  8.16.4 Private Citizen Suits

Appendix 8.1 Conflict of Interest Disclosure Memorandum
CHAPTER 8
CONFLICT OF INTEREST

Conflicts of interest require public officers and employees to make fact-specific assessments of the interests involved based on statutorily-established standards and exceptions. This Chapter provides general guidelines that public officers and employees should evaluate before conflicts arise. The Handbook does not address every situation that may qualify as a conflict of interest and does not assess all specialized conflict of interest prohibitions that may apply to particular state entities. Therefore, public officers and employees should consult with counsel concerning conflicts of interest not specifically addressed in this Chapter.

8.1 Scope of this Chapter. This Chapter addresses the statutory conflict of interest laws contained in A.R.S. §§ 38-501 to -511, as well as the incompatibility doctrine. These statutes set the minimum standards expected of public officers and employees who, in their official capacities, are faced with a decision or contract that might affect their pecuniary or proprietary interests or those of a relative.

8.2 The Arizona Conflict of Interest Laws. State statute provides 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.

A.R.S. § 38-503. Under this law, a public officer or employee who has a conflict of interest must disclose the interest and refrain from participating in the matter.

interests of public officers or employees must not conflict with the unbiased performance of their public duties because "one cannot serve two masters with conflicting interests." Id. Public officials should avoid situations where their professional or financial concerns might conflict with the unbiased performance of their duties. Id.; see generally United States v. Miss. Valley Generating Co., 364 U.S. 520, 549 (1961) ("The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.").

**8.2.2 Scope of Application.** The conflict of interest prohibitions “apply to all public officers and employees of incorporated cities or towns, of political subdivisions and of the state and any of its departments, commissions, agencies, bodies or boards.” A.R.S. § 38-501(A). Essentially, A.R.S. §§ 38-502 through -511 supercede any local charter or local ordinance. A.R.S. § 38-501(B). Any other State statutes on specific conflicts of interest are in addition to the conflict of interest provisions set forth in Title 38. A.R.S. § 38-501(C).

**8.2.3 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 public officers as that term is used in the conflict of interest laws. Ariz. Att'y Gen. Op. I75-211; see also Ariz. Att'y Gen. Ops. I82-105, I88-014, I89-067. All elected officials at the state or local level and directors of state agencies are public officers for the purposes of the conflict of interest laws. For example, the Director of the Department of Health Services is appointed by the Governor; as such, the Director is an appointed officer of a public agency established by state statute and is covered by the conflict of interest laws. A.R.S. § 36-102. Although the members of the Legislature are subject to the requirements of A.R.S. §§ 38-501 through -511, they are also 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.

The members of Arizona's many regulatory boards are also public officers covered by the conflict of interest laws, whether they are paid for or volunteer their services. A.R.S. § 38-502(6), (8). Because of their familiarity with the special areas they regulate or advise, 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 and appearances of impropriety. Conflict of interest rules may have a constitutional, as well as statutory, basis because due process requires that members of a regulatory board not have a direct interest in their decisions affecting licensees or other regulated entities. See Tumey v. Ohio, 273 U.S. 510, 532 (1927).

**8.2.4 Public Employees.** Anyone employed "by an incorporated city or town, a political subdivision or the state or any of its departments, commissions, agencies, bodies or boards for remuneration," 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 by the conflict of interest laws. The consultant would be prohibited from making recommendations if he or she owned or had an interest in a parcel of land that might be affected by the Department's decision concerning the route of the interstate highway. See Ariz. Att'y Gen. Op. I89-067.

8.2.5 Relatives. The conflict of interest laws require an examination of proprietary and pecuniary interests of the public officer or employee and certain relatives of the officer or employee. A.R.S. § 38-503(B). “Relative” is expansively defined and includes: “the spouse, child, child's child, parent, grandparent, brother or sister of the whole or half blood and their spouses and the parent, brother, sister or child of a spouse.” A.R.S. § 38-502(9).

Public officers and employees must recognize that while they may not have a substantial interest in a decision or a contract, if one of the relatives described in A.R.S. § 38-502(9) has a substantial interest, the public officer or employee must disclose the interest and refrain from participating in the matter. A.R.S. § 38-503(B). Even negligence in failing to comply with the conflict of interest law can trigger serious consequences. See, e.g., A.R.S. § 38-510(A)(2)(reckless or negligent conduct may violate the law). A public officer or employee has an obligation to become aware of the interests of relatives in matters in which the officer or employee may become involved.

8.3 Substantial Interest. When assessing whether a public officer or employee has a conflict of interest, the starting point is to evaluate whether the official or the official’s relative has a “substantial interest” in the matter under consideration. An interest is “substantial” if it is not defined by statute as “remote” and if it is "any pecuniary or proprietary interest, either direct or indirect," of public officers or employees or of their relatives. A.R.S. § 38-502(11). The term “interest” does not mean a mere abstract interest in the general subject or a contingent interest but is a “pecuniary or proprietary interest, by which a person will gain or lose something, as contrasted with a general sympathy, feeling or bias.” Yetman, 16 Ariz. App. at 317, 492 P.2d at 1255. “[T]o violate the conflict of interest statute, a public official must have a non-speculative, non-remote pecuniary or proprietary interest in the decision at issue.” Hughes v. Jorgenson, 203 Ariz 71, 74-75, 50 P.3d 821, 824-25 (2002) (neither county sheriff nor his sister had a substantial interest in the sister’s possible criminal prosecution); compare Ariz. Att’y Gen. Op. I03-005 (stating that school district governing board member whose employer is a public utility that supplies natural gas to areas in the district must refrain from participating in any discussions or decisions concerning the choice of power to district schools when the board member’s employer is a potential supplier), with Ariz. Att’y Gen. Op. I01-009 (stating that because school board members have no pecuniary or proprietary interest in retaining an elected governing board position, they do not have a conflict of interest that would preclude them from voting on a district unification issue that would result in loss of their position).
The Legislature has determined that certain economic interests are so remote that they do not impermissibly influence a person's decisions or actions. These "remote interests" are listed in A.R.S. § 38-502(10). Unless the interest at issue falls within one of the statutorily specified situations declared by the Legislature to be remote, the interest is substantial and creates a conflict of interest. Yetman, 16 Ariz. App. at 317, 492 P.2d at 1255.

To determine whether a substantial interest exists, the public officer should ask the following questions:

1. Will the decision affect, either positively or negatively, an interest of the officer or employee or the officer's or employee's relative?

2. Is the interest a pecuniary or proprietary interest?

3. Is the interest other than one statutorily designated as a remote interest?

If the answer to each of these questions is yes, then a substantial interest exists that requires disclosure and disqualification by the public officer or employee.

8.4 Remote Interests.

8.4.1 Generally. A.R.S. § 38-502(11) excludes from the definition of a substantial interest the ten remote interests enumerated in A.R.S. § 38-502(10). 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. See A.R.S. § 38-503. A public officer or employee who has any pecuniary or proprietary interest in a decision or contract not covered by one of the statutorily-designated remote interests would have a substantial interest that requires disclosure of the interest and refraining from all participation in the decision or contract. A.R.S. §§ 38-502(11), -503(A) and (B). Because a thorough understanding of the remote interests is essential in determining whether the conflict of interest laws apply in a given situation, the remote interests are discussed separately in Sections 8.4.2 to 8.4.11.

8.4.2 Nonprofit Corporations. If the public officer or employee or a relative is a nonsalaried officer of a nonprofit corporation, he or she has a remote interest in any decision affecting that corporation. A.R.S. § 38-502(10)(a).

8.4.3 Landlord/Tenant of a Contracting Party. If the public officer or employee or a relative is a landlord or tenant of a party contracting with an agency, the officer or employee has a remote interest in a decision regarding the contract. A.R.S. § 38-502(10)(b).

8.4.4 Attorney of a Contracting Party. If the public officer's or employee's relative represents a client contracting with the officer's or employee's agency, he or she has a remote interest in any agency decision affecting the client's contract. A.R.S.
§ 38-502(10)(c). For example, if 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 related to the Director of the Department of Economic Security, the Director's interest in the awarding of the contract is remote. *Id.*

8.4.5 Nonprofit Cooperative Marketing Associations. If the public officer or employee or a relative is a member of a nonprofit cooperative marketing association, he or she has a remote interest in any decision affecting that association. A.R.S. § 38-502(10)(d).

8.4.6 Insignificant Stock Ownership. If the public officer or employee or a relative owns less than three percent of the shares of a corporation for profit, and if the income from those shares or any other payments made by the corporation to the public officer or employee or relative does not exceed five percent of the person's total annual income, he or she has a remote interest in any decision affecting that corporation. A.R.S. § 38-502(10)(e).

8.4.7 Reimbursement of Expenses. If the public officer or employee is being reimbursed for actual and necessary expenses incurred in the performance of official duties, he or she has a remote interest in any decision affecting that reimbursement. A.R.S. § 38-502(10)(f).

8.4.8 Recipient of Public Services Generally Available. If the public officer or employee is a recipient of public services provided by the governmental agency of which he or she is employed, and if those services are available to the general public, the public officer or employee has a remote interest in any decision affecting those services. A.R.S. § 38-502(10)(g). For example, employees 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 who are not officers or employees of the Department of Transportation. However, if the decision concerns the building of a highway adjacent to property owned by an employee, the employee could be said to have a substantial interest and may not participate in it. See A.R.S. § 38-502(11).

8.4.9 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 a decision made by the school board, then the interest is remote, and the school board member is not barred from participating in the decision. A.R.S. § 38-502(10)(h). For example, if a school board member votes on teachers' contracts for the district and has a relative, other than a spouse or dependent, who is a teacher in the district, the board member's interest is remote, and he or she may participate in the decision. See Ariz. Att'y Gen. Op. I00-013. However, if the school board member's dependent is a teacher covered by the contract, the board member must then disclose his or her dependent's interest and refrain from participating in the decision, because the interest is no longer remote. A.R.S. § 38-502(11). Section 38-503(D) prohibits the governing board of a school district or community college district from employing a person...
who is a member of a governing board or who is the spouse of a member of the governing board. See also A.R.S. §§ 15-421(D), -1441(H).

8.4.10 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 or political subdivision. A.R.S. § 38-502(10)(i),(i)-(ii). For example, the head of the state agency responsible for allocating funds to local governments could participate in such decisions even though his or her spouse was an officer or employee of the local government. If, however, the decision confers a 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. Ariz. Att'y Gen. Op. I87-051.

8.4.11 Class Interests. If the public officer or employee or a relative is a member of a trade, business, profession, or other class of persons, and his or her interest is no greater than the interest of the other members of the class, the public officer or employee has a remote interest in any decision affecting the class. A.R.S. § 38-502(10)(j). For example, if members of the State Board of Dental Examiners were considering approving a rule prohibiting certain types of advertising, the interest of the dentists on the Board in the decision would be no greater than that of other licensed dentists and, therefore, they would not have to disclose the interest and would be allowed to participate in the decision regarding that rule. See, e.g., Ariz. Att'y Gen. Op. I79-142.

However, if a board member's judgment on a board matter is affected by the special interest of the professional association, a conflict of interest could arise. For example, in Gibson v. Berryhill, 411 U.S. 564, 567-68 (1973), the United States Supreme Court held that the Alabama Board of Optometry, which was comprised solely of independent practitioners, was disqualified from deciding whether optometrists employed by corporations engaged in "unprofessional conduct" because they were "aiding and abetting . . . the illegal practice of optometry." The district court determined 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." See id. at 571.

8.5 Contracts for Supplies or Services. Should a public officer or employee wish to supply goods or services to his or her agency, the contract must be awarded pursuant to public competitive bidding. A.R.S. § 38-503(C). This requirement of public competitive bidding is in addition to the disclosure and non-participation requirements discussed in Section 8.6. The public competitive bidding requirement does not apply to school district governing boards in the limited situations specified in A.R.S. § 38-503(C)(1). A.R.S. § 38-503(C) requires school districts to follow public competitive bidding procedures for all procurements between school districts and their employees, however, regardless of the dollar amount involved and regardless of the source of the funds. Ariz. Att'y Gen. Op. I06-002.
Although the competitive bidding requirements of A.R.S. § 38-503(C) do not generally apply to corporations, a public officer or an employee who sells supplies or services to the agency may not evade the bidding requirements of A.R.S. § 38-503(C) by forming a corporation that is the alter ego of the officer or the employee to avoid public competitive bidding. Ariz. Att'y Gen. Op. I86-036.

8.5.1 Contracts Made by Spouses of Public Officers or Employees. Although A.R.S. § 38-503(C) prohibits public officers and employees from supplying equipment, materials, supplies, or services to the public agency except pursuant to an award or contract let after public competitive bidding, such restrictions do not apply to the spouse of the officer or employee. Ariz. Att'y Gen. Op. I99-020. However, the public officer or employee must disclose the interest and refrain from any involvement in the matter. Id.

8.6 Strict Compliance. Once a public officer or employee determines that a substantial interest may be affected, the officer or employee must disclose the interest and withdraw from all participation in the decision or contract. A.R.S. § 38-503(A), (B). Even though public officers or employees may believe that they can be objective in making a decision and that the public interest would not be harmed by their participation, they do not have discretion to ignore the statutory mandate. Id.

Arizona's conflict of interest statutes are broadly construed in favor of the public, and the Legislature has provided substantial civil and criminal penalties for failure to comply with the statutory mandates. See Sections 8.16.1 - 8.16.4.

8.7 Disclosure of the Interest. Every political subdivision and public agency subject to A.R.S. §§ 38-501 to -511 must "maintain for public inspection in a special file all documents necessary to memorialize all disclosures of substantial interest made known pursuant to this article [A.R.S. §§ 38-501 to -511]." A.R.S. § 38-509. Any public officer or employee who has a conflict of interest in any agency decision or in the award of a contract must provide written disclosure of that interest in the agency's special conflict of interest file. 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), -509. See, e.g., Appendix 8.1 (Sample Disclosure Memorandum).

Having disclosed the conflict of interest and withdrawn from participation in the matter, the employee or officer must not communicate about the matter with anyone involved in the decision-making process in order to avoid a violation of A.R.S. § 38-503(A) or (B) and the appearance of impropriety.

8.8 Rule of Impossibility. In the unlikely situation that a public agency cannot act because most of its members have a conflict of interest, members may participate in the agency's decision after making known their conflicts of interest in the agency's official records. A.R.S. § 38-508(B). This is referred to as "the rule of impossibility." It is important to note that before the rule of impossibility will apply to a multi-member board or
commission, the majority of the entire membership of the board or commission must be unable to participate because of conflicts of interest. The rule of impossibility may not be invoked if merely a quorum of the public body is present and unable to act because of conflicts. In those cases, the public agency must reconvene to take up the matter when all the members are present.

### 8.9 Other Conflict of Interest Laws.

In addition to the general conflicts statutes found at A.R.S. §§ 38-501 to -511, other state statutes impose specific conflict of interest prohibitions on public officers and employees. Examples of these restrictions include:

- **A.R.S. § 4-114(A)** (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(C)-(E), -103.01, -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(A)** (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 Banking Department);
- **A.R.S. § 16-531(D)** (prohibiting election-related board members from being a federal, state, county, or precinct officer or a candidate for office at the election);
- **A.R.S. § 20-149(A)** (prohibiting the Director of the Department of Insurance and other Department of Insurance personnel from having a financial interest, except as a policyholder or a claimant under a policy, in an entity regulated by the department);
- **A.R.S. § 35-705** (prohibiting board members of a municipal or county industrial development authority from being an officer or employee of the authorizing county or municipality);
- **A.R.S. § 37-132(C)** (prohibiting the Commissioner, any deputy or employee of the Land Department from owning or acquiring any interest in state lands);
- **A.R.S. § 38-481** (prohibiting public officials from appointing relatives to salaried public service positions).

Public officers or employees should refer to the statutes governing their particular agency for specific provisions regarding standards of conduct for that agency and its officers and employees.

### 8.10 Incompatibility of Public Offices.

The common-law doctrine of incompatibility of public offices provides 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 that either conflict with the first position or render it physically impossible for the individual to perform the duties of both positions. **Coleman v. Lee,** 58 Ariz. 506, 513, 121 P.2d 433, 436-37 (1942). Under this doctrine, the person in question is deemed to have automatically vacated the first position upon accepting the second, incompatible position.

### 8.11 Representation of Others After Leaving Public Service.

State law also places restrictions on representation of others when a public officer or employee departs from state service. In particular, **A.R.S. § 38-504(A)** provides:
A public officer or employee shall not represent another person for compensation before a public agency by which the officer or employee is or was employed within the preceding twelve months or on which the officer or employee serves or served within the preceding twelve months concerning any matter with which such officer or employee was directly concerned and in which the officer or employee personally participated during the officer’s or employee’s 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 before the Commission for one year after the employee has resigned from state service.

8.12 Disclosure or Use of Information Declared Confidential by Law. During the course of employment and for two years thereafter, public officers and employees are prohibited from disclosing or using, without appropriate authorization, any information acquired in the course of their official duties designated as confidential or information made confidential by statute or rule. A.R.S. § 38-504(B). An example of such information is confidential tax information provided to an Assistant Attorney General for the limited uses specified in A.R.S. § 42-2003. For a list of other information that is confidential as a matter of law, see Chapter 6, Appendix 6.1 and 6.2.

8.13 Disclosure or Use of Information Made Confidential By Agency Action. Public officers and employees also are prohibited from disclosing or using for profit information that is designated confidential, other than by statute or rule, and which they obtained from their agency as a result of their employment or service with the agency. A.R.S. § 38-504(B). The prohibition exists during the course of employment and for two years after employment has terminated, unless authorization from the agency has been obtained. Id. For example, if during the course of employment, a former employee of the Department of Health Services acquired information the Department had designated as confidential, the employee may not disclose the information or use it for personal profit for two years after termination of employment or service with the Department.

The prohibition includes either disclosing or using confidential information. Id. Thus, even though a public officer or employee does not benefit or profit from the disclosure, A.R.S. § 38-504(B) prohibits them from disclosing the confidential information for the statutory period. Id.

8.14 Improper Use of Office for Personal Gain. Public officers and employees are prohibited from using or attempting to use their official position to secure valuable things or benefits for themselves that would not be part of their normal compensation for performing their duties. A.R.S. § 38-504(C). It is a class 4 felony for a public servant to solicit, accept, or agree to accept any benefit upon an understanding that his or her 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 for, or to 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 in return for a gift of a thoroughbred horse, the commission member would violate the above-referenced criminal laws as well as the conflict of interest laws. A criminal violation of A.R.S. §38-504(C) requires an action related to the official duties as public officer. State v. Ross, 214 Ariz. 280, 285-86, 151 P.3d 1261, 1266-67 (App. 2007) (defendant county assessor’s use of publicly available information from his agency to further his own business purposes did not violate conflict of interest prohibition because it did not involve any action related to his duties as a public officer).

8.15 Receiving Additional Income for Services. Public officers and employees are prohibited from agreeing to receive or receiving, either directly or indirectly, compensation other than as provided by law for services they rendered in any case, proceeding, application, or other matter pending before an agency. A.R.S. § 38-505(A).

8.16 Sanctions for Violations.

8.16.1 Criminal Penalties. Knowingly or intentionally violating any provision of the conflict of interest laws is a class 6 felony. A.R.S. § 38-510(A)(1).

Negligent or reckless violation of the law is a class 1 misdemeanor. This means that public officers or employees may be prosecuted if they fail to disclose a conflict of interest of which they should have known. A.R.S. § 38-510(A)(2).

Knowingly falsifying, concealing, or covering up a material fact as part of 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.

8.16.2 Forfeiture of Public Office. Upon conviction of a violation of the conflict of interest laws, a public officer or employee forfeits the public office or employment. A.R.S. § 38-510(B).

8.16.3 Contract Cancellation. Any contract made by the state or any of its departments or agencies is subject to cancellation within three years after its execution if anyone significantly involved in the contract process on behalf of the state is also an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract while the contract or contract extension is in effect. A.R.S. § 38-511(A). A person who had a significant role on behalf of the state in the contract’s negotiation or drafting may, however, serve as a consultant to another party to the contract in unrelated matters without subjecting the contract to cancellation. Ariz. Att’y Gen. Op. I08-010.

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. A.R.S. § 38-506(A). In Maucher, the
Arizona Court of Appeals held that the City of Eloy was entitled to void a contract with an engineer and the City because the contract was let without public competitive bidding and was entered into in violation of Arizona’s conflict of interest laws. *Maucher*, 145 Ariz. at 337-38, 701 P.2d at 595-96. The court ruled that the engineer could not recover his losses under the cancelled contract by any legal theory, including restitution or quantum meruit. *Id.*

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*, 375 P.2d 289, 292 (Cal. 1962); *see also Maucher*, 145 Ariz. at 337, 701 P.2d at 595 (“It is clear in Arizona that ‘. . . the letting of contracts for public business should be above suspicion or favoritism.’”) (quoting *Brown v. City of Phoenix*, 77 Ariz. 368, 377, 272 P.2d 358, 367 (1954)). A public agency may also recover any consideration or payments that it has paid to the public officer or employee under the contract, without restoring the benefits received by the agency under the contract. *See*, e.g., A.R.S. § 38-511(E). This is true even though no actual fraud or dishonesty was involved on the part of the public officer or employee. *Id.; see also Thomson v. Call*, 699 P.2d 316, 324 (Cal. 1985).

8.16.4 Private Citizen Suits. Any person who is affected by a public agency's decision made in violation of the conflict of interest laws may sue to have the contract or decision declared null and void. A.R.S. § 38-506(B). The court may award costs and attorney's fees to the prevailing party. A.R.S. § 38-506(C). Persons claiming that a public officer, employee, or board member had a pecuniary interest in making a decision against them may also file suit in state or federal court alleging a violation of their civil rights pursuant to 42 U.S.C. § 1983.
APPENDIX 8.1

CONFLICT OF INTEREST DISCLOSURE MEMORANDUM

Section 8.7

TO:  (Name and position of Public Agency Supervisor)

FROM:  (Name and position of employee or officer)

RE:  CONFLICT OF INTEREST DISCLOSURE PURSUANT TO A.R.S. §§ 38-501 to -511

1. Identify the decision, case investigation, or other matter in which you or your relative may have a "substantial interest" under A.R.S. §§ 38-501 to -511.

(use as much space as necessary)

2. Describe the "substantial interest" referred to above.

(use as much space as necessary)

Statement of Disqualification

To avoid any possible conflict of interest under A.R.S. §§ 38-501 to -511, I will refrain from participating in any manner in the matter identified above.

_________________________  ______________________
Date                     Signature

cc:  (supervisors)
CHAPTER 9
LICENSING

Table of Contents

Section 9.1 Scope of this Chapter
Section 9.2 General Description
Section 9.3 Entry Requirements
  9.3.1 Education and Experience
  9.3.2 Examinations
  9.3.3 Character
  9.3.4 Licensing by Reciprocity and Endorsement
Section 9.4 Issuing or Denying the License
  9.4.1 Applications and Screening Methods
  9.4.2 Licensing Time Frames
  9.4.3 Issuance of the License
  9.4.4 Denial of the License
Section 9.5 Licensing Regulation
Section 9.6 Disciplinary Actions
  9.6.1 Actions by Agencies in Other Jurisdictions
  9.6.2 Conviction of a Criminal Offense
  9.6.3 Violation of Civil or Licensing Laws
  9.6.4 Incompetence, Malpractice, and Negligence
  9.6.5 Unprofessional Conduct
  9.6.6 Misleading or Fraudulent Conduct

Revised 2011
9.6.7 Alcohol or Substance Abuse
9.6.8 Failure to Comply with Continuing Education Requirements

Section 9.7 Cancellation or Surrender of License

Section 9.8 Renewal and Reinstatement

9.8.1 License Renewal
9.8.2 Reinstatement of License

Section 9.9 Other Legal Provisions Affecting Licensing Agencies

9.9.1 Effect of No Contest Pleas
9.9.2 Restoration of Civil Rights
9.9.3 Social Security Numbers
9.9.4 Access to Criminal History Record Information

Section 9.10 Antitrust Considerations for Licensing Agencies

9.10.1 Restrictions on Price Competition
9.10.2 Barriers to Entry

Section 9.11 Immigration-Related Laws

Revised 2011
CHAPTER 9
LICENSING

9.1 Scope of This Chapter. This Chapter discusses the licensing function of administrative agencies and common grounds for agency disciplinary action. See also Chapter 10 (Administrative Adjudications), Chapter 12 (Enforcement). This Chapter also provides general information concerning other laws that affect licensing, including laws governing the use of social security numbers, the effect of a restoration of civil rights, and the access to criminal history record information.

9.2 General Description. In Arizona, licensing is performed by those agencies responsible for regulating various professions, occupations, and businesses. Most of these professions, occupations, and businesses are issued “licenses” or “permits,” with the remainder being either “registered” or issued “certificates.” For purposes of this Chapter, permits, licenses, registrations, and certificates are included within the definition and discussion of "license" and "licensing." See also A.R.S. § 41-1001(11) (defining "license"). Material distinctions among various licensing procedures are noted.

An agency authorized to issue a license usually grants to the person or entity the right to engage in a particular activity; unlicensed persons may not engage in that activity. An agency authorized to register or issue a certificate normally grants only the right to use a certain professional or occupational title (such as certified public accountants); others are free to engage in such professional activities provided they do not use the reserved title.

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 authorize the regulation of all licensed persons, including the initiation of disciplinary actions. Statutory standards and directives are generally implemented through rulemaking. See Chapter 11.

Individuals seeking licensure are entitled to fair and open regulation by state agencies. In 1998, the Legislature created the regulatory bill of rights to codify the procedural rights individuals have in dealing with state agencies. See A.R.S. § 41-1001.01.

1 "'Agency' means any board, commission, department, officer or other administrative unit of this state...." A.R.S. § 41-1001(1).
9.3 Entry Requirements. An applicant must satisfy entry requirements in order to obtain a license to engage in a profession or occupation. Agencies are responsible for implementing and interpreting statutory entry requirements. However, agencies may not impose entry requirements not authorized by statute. *Bd. of FuneralDirs. & Embalmers v. Perlman*, 108 Ariz. 33, 34, 492 P.2d 694, 695 (1972). See also *Bd. of Dental Exam’rs. v. Hoffman*, 23 Ariz. App. 116, 118, 531 P.2d 161, 163 (1975). Entry requirements typically include:

1. Education and experience requirements;
2. Examination requirements;
3. Character requirements; and
4. Minimum age requirements.

Each agency should examine its governing statutes to determine what entry requirements have been established for individuals seeking licensure.

The agency may not waive statutory entry requirements unless authorized by statute. *E.g.*, A.R.S. § 32-126(A). In rare instances when a profession is first regulated or is being re-regulated, entry requirements may be waived by "grandfather" clauses that allow persons previously engaged in that profession or occupation to continue their activities. *E.g.*, A.R.S. § 32-2212(C).

9.3.1 Education and Experience. An applicant may be required to satisfy specified education or experience requirements to qualify for licensure in a regulated profession or occupation. These requirements 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 prescribe a specific number of months or years of experience as an employee, apprentice, or trainee of a licensee in a profession or occupation. When 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 in the profession or occupation may be required for certification or registration.

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 written, practical, or oral examinations conducted by the agency. Where the agency develops its own examinations, the agency should carefully ensure that the content and structure of each question, the method of evaluating the answers, and the area of knowledge examined fulfill the statutory purpose of the examination.

To ensure the 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 allegations that an examinee cheated. The procedures should be adopted in rules. See Chapter 11.

Oral examinations, and practical examinations to a lesser extent, are extremely susceptible to challenge because of the subjectivity involved in asking questions and evaluating answers. The agency should institute uniform procedures for giving such examinations to ensure that an examiner's evaluation is not influenced by the examinee's demeanor, appearance, or 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.

The Americans with Disabilities Act ("ADA") requires that reasonable accommodations be made for the testing of disabled applicants. See Chapter 15 for a discussion of the ADA. Agencies should consult with their legal counsel regarding the possible impact of the ADA on the examination process.

9.3.3 Character. Licensing statutes or regulations may require licensees 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 "[l]ack of good character and reputation may be established by showing that a person has engaged in contracting without a license or has committed any act that, if . . . done by any licensed contractor," would be grounds to initiate disciplinary proceedings. A.R.S. § 32-1122(D). When no specific legislative direction is provided, agencies may adopt a rule requiring persons applying to practice in a profession or occupation to possess the requisite good moral character, provided the rule is consistent with the agency's statutory authority. Cal. Portland Cement v. Picture Rocks Fire D., 143 Ariz. 166, 170, 692 P.2d 1015, 1018 (App. 1984) (discussing authority to make rules relating to probationary status). If good moral character is a condition of licensure and not defined by statute or regulation, the agency should adopt rules that establish the standards used to evaluate moral character. Clearly delineating the standards for denying a license due to moral character will avoid constitutional challenges on the basis that the denial is arbitrary and capricious. See Hide-A-Way Massage Parlor, Inc. v. Bd. of Cnty. Comm'rs., 597 P.2d 564, 566 (Colo. 1979). If a license is denied for lack of good character, the agency should articulate the factual basis for its finding.
9.3.4 Licensing by Reciprocity and Endorsement. If authorized by statute, applicants who currently hold valid licenses in other states or jurisdictions may 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 the written examination, may be waived for those licensed elsewhere. In addition, an applicant for reciprocal or endorsement licensing frequently must meet other 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(A)(1) (chiropractic examiners), -1683(5)(a) (dispensing opticians). Other requirements for licensure by reciprocity or endorsement sometimes include passing a uniform national examination or examination of another state or jurisdiction, e.g., A.R.S. § 32-1426(A) (medical doctors); a particular educational background or degree, e.g., A.R.S. § 32-1922(B)(1) (pharmacists); or a minimum level of experience in the profession or occupation, e.g., A.R.S. § 32-1523(3) (naturopathic doctors). Under reciprocal licensing, the state or jurisdiction in which the applicant is licensed must grant the holders of Arizona licenses waiver of entry requirements similar to those waived in Arizona. E.g., A.R.S. §§ 32-322(C) (barbers).

The 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 listed 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 practice of the profession by the applicant prior to issuance of the license. Voluntary surrender of a license in another state or jurisdiction may justify denial of a license. Agencies must look to the circumstances of the surrender to determine whether grounds exist to deny the license application.

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 requires 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 be consistent with the statutory requirements for licensure.

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 disciplinary actions pending 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 the 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 subsequent revocation of the license, with citation to the appropriate statutory authority. See A.R.S. § 13-2704. Agencies should encourage applicants to provide copies of court documents 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 may encourage false applications and penalize applicants who are candid. See Section 9.9.4. Finally, if education is a requirement, the agency should obtain certified copies of transcripts.

Agencies should also adopt procedures to verify application information. For example, if the applicant has been licensed in another state, disclosure of available information concerning criminal or disciplinary matters should be requested from law enforcement and licensing agencies of that state. If appropriate, a copy of the license application on file in that 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 reviewed to verify information. See also Section 9.9.4.

9.4.2 Licensing Time Frames. State agencies are required to complete their review of applications for licensure and to grant or deny the application within specific time frames established in the agency's administrative rules. The agency is subject to specific penalties if it fails to act on an application within its licensing time frames. See A.R.S. § 41-1077.

9.4.3 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. See Bd. of Funeral Dirs. & Embalmers v. Perlman, 108 Ariz. 33, 492 P.2d 694 (1972). In the absence of specific statutory authority, the agency may not issue a conditional license placing restrictions on the licensee or the license.

9.4.4 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. An agency’s decision to deny an application constitutes an appealable agency action, which may be challenged by the applicant in a formal administrative hearing. See A.R.S. §§ 41-1092(3) and -1092.02 through .09. See Chapter 10 for a discussion of the hearing procedures.

In some cases, the denial of a license application has significant consequences. For instance, a contractor's license may not be issued to an applicant who has been
refused such a license within the preceding year. A.R.S. § 32-1122(E). Where such consequences attach, applicants may wish to withdraw their applications to avoid the taint of a denial. Although applicants do not have an absolute right to withdraw license applications (Simms v. Napolitano, 205 Ariz. 500, 505, 73 P.3d 631, 636 (App. 2003), an agency may wish to adopt rules governing the withdrawal of license applications to preclude controversies.

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.

Statutes and rules 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 (real estate brokers); to notify the agency of personal or professional address information or changes, e.g., A.R.S. §§ 32-923(A) (chiropractors), -1435(A) (medical doctors); to complete minimum continuing education as a requirement for renewing the license, e.g., A.R.S. §§ 32-1726(B) (optometrists), -1825(B) (osteopathic doctors); to obtain liability insurance or surety bonding, e.g., A.R.S. §§ 32-1152(A) (contractors), -2613(C)(2) (security guards); to possess identification documents, e.g., A.R.S. § 32-125 (board of technical registration); or to use seals, e.g., A.R.S. § 32-125 (board of technical registration); or to display a license or signboard, e.g., A.R.S. §§ 32-351 (barbers), -1262(C) (dentists), -2126(B) (real estate brokers).

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 (liquor licenses), 32-504(B) (cosmetologists), 32-1904(A)(4) (pharmacists). However, such inspections must be conducted within prescribed standards. See A.R.S. § 41-1009. Where violations are revealed and proved after appropriate administrative proceedings, the agency may impose enforcement sanctions.

Agencies typically are authorized to deny, refuse to renew, suspend, or revoke a license. Most agencies also may censure licensees, impose probation, or assess civil monetary penalties. Further sanctions available to agencies by specific statutory authority include reprimands, practice limitations or restrictions, and public reproof. See, e.g., A.R.S. §§ 32-1451(I) (medical doctors), -2081 (psychologists). Many agencies are authorized to petition the superior court for an injunction restraining or prohibiting violations of licensing laws or restraining unlicensed activities. See, e.g., A.R.S. §§ 32-1666.01 (nurses), -1995 (pharmacists). In addition, some agencies may issue cease and desist orders prohibiting unlicensed activities. See, e.g., A.R.S. § 32-3284 (behavioral health providers). 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 supervised persons. E.g., A.R.S. §§ 4-210(B)(2) (liquor licenses), 32-2043 (physical therapists). Because the grounds for such actions vary significantly 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 been subject to disciplinary action in another state or jurisdiction. The imposition of sanctions by another state or jurisdiction may itself suffice as a predicate for agency disciplinary action. E.g., A.R.S. §§ 32-1601(18)(f) (nurses), -1901.01(B)(5) (pharmacists). Sometimes, however, to support disciplinary action, a denial, suspension, or revocation of a license by another state or jurisdiction must either relate directly to the ability to practice a particular profession or occupation or be based on conduct that would provide grounds for disciplinary action in this state. See, e.g., A.R.S. § 32-1401(27)(o) (medical doctors).

Some statutes provide that the underlying enforcement sanction must have been imposed "for cause." E.g., A.R.S. §§ 32-741(A)(10) (accountants), -2321(B)(9) (structural pest control professionals). The phrase "for cause" requires that the foreign license was revoked or suspended because of misconduct or illegal activity. See Johnson v. Mofford, 193 Ariz. 540, 543, ¶12, 975 P.2d 130, 133 (App. 1998) ("'cause' implies some inability, incapacity or unfitness.") (relying on Farish v. Young, 18 Ariz. 298, 302, 158 P. 845, 847 (1916)).

A voluntary surrender of a license in another jurisdiction alone does not justify the initiation of disciplinary proceedings against a licensee. Agencies must look to the underlying 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 ensure the free flow of enforcement information among the jurisdictions.

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 such offenses include reckless driving, simple assault, disorderly conduct, *State ex rel. Dean v. City Court of Tucson*, 141 Ariz. 361, 363, 687 P.2d 369, 371 (App. 1984), and possession of marijuana, *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989). Where it is unclear if a particular offense involves moral turpitude, agencies should consult with their legal counsel to resolve the issue.

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. *Bear v. Nicholls*, 142 Ariz. 560, 691 P.2d 326 (App. 1984). See also Section 9.9.1 for further discussion of no contest pleas.

9.6.3 Violation of Civil or Licensing Laws. Most agencies are authorized to take disciplinary action against any licensee who violates the agency's statutes or rules. Some agencies may also take disciplinary actions upon the violation of other federal, state, or local laws, or the rules applicable to the practice of the profession or occupation involved, whether or not the violation resulted in a sanction. *E.g.*, A.R.S. §§ 32-854.01(18) (podiatrists); -1401(27)(a) (medical doctors) (federal and state laws or applicable rules and regulations); -1301(54)(g) (funeral directors and embalmers); -1743(12) (optometrists) (statutes or rules); -1501(31)(s) (nautopathic doctors) (federal, 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 conduct varies among the agencies but generally contains in some form the terms "incompetence," "malpractice," or "negligence." For example, the phrase "malpractice or incompetency" appears in A.R.S. §§ 32-353(2) (barbers) and -572(A)(4) (cosmetologists). Gross or repeated malpractice is commonly used in the statutes governing health professionals. *E.g.*, A.R.S. § 32-1201(21)(d) (dentists). Some statutes contain provisions specifically defining malpractice within the regulated profession. *E.g.*, A.R.S. § 32-2201(14) (veterinarians). "Gross negligence" or "continuing negligence" is referred to in statutes governing such diverse professions as accountants (A.R.S. § 32-741(A)(4)) and funeral directors (A.R.S. § 32-1366(A)(2)). If an agency commences a disciplinary action based on malpractice, negligence, or gross negligence, it must provide notice to the professional of the applicable standard of care and how the professional's conduct deviated from that standard. *See Gaveck v. Ariz. Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 438, 215 P.3d 1114, 1119 (App. 2009); *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 560, 48 P.3d 505, 510 (App. 2002). The agency must then make specific factual findings on both the standard of care and the deviation in its order. *Webb*, 202 Ariz. at 560, 48 P.3d at 510.

9.6.5 Unprofessional Conduct. Many regulatory statutes authorize disciplinary action for "unprofessional conduct," which is generally defined with
particularity in statute or by agency rule. E.g., A.R.S. §§ 32-1201(21) (dentists) and -1401(27) (medical doctors). However defined, "unprofessional conduct' cannot be given any definition that would make it subject to constitutional attack on grounds of vagueness." Ariz. State Bd. of Med. Exam'r's v. Clark, 97 Ariz. 205, 214, 398 P.2d 908, 915 (1965). These definitional provisions routinely encompass various proscribed acts, including some of those described immediately above. Many of these acts are general and are shared among several occupations or professions, while others are peculiar to the occupation or profession involved. Some examples of unprofessional conduct not already referred to include failing or refusing to maintain adequate records; representing or holding oneself out as being a professional when one is not; engaging in sexual conduct 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 statutes and rules to determine the definitional scope of "unprofessional conduct."

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, e.g., A.R.S. § 32-1601(18)(h) (nurses). This conduct may relate to the actual practice of a profession or occupation, e.g., A.R.S. § 32-1201(21)(l) (dentists) ("making any false or fraudulent statement . . . in connection with the practice of dentistry"), or to advertising connected with the practice, e.g., A.R.S. §§ 32-353(3) (barbers), -2232(9) (veterinarians). 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(27)(c),(v) (medical doctors), -1501(31)(i), (o), (aa) (naturopathic doctors).

Many agencies have additional authority to initiate disciplinary action when a false or misleading statement is made in an application for a license, e.g., A.R.S. § 32-1391.15(4) (funeral directors and embalmers), a qualification examination, e.g., A.R.S. § 32-128(C)(1) (board of technical registration), or, more generally, in procuring or obtaining a license, e.g., A.R.S. §§ 32-741(A)(3) (accountants), -1601(18)(a) (nurses).

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 that will justify disciplinary action. E.g., A.R.S. §§ 32-924(A)(4) (chiropractors). The Americans with Disabilities Act ("ADA") may have implications for agencies initiating disciplinary action against alcohol or substance abusers. Agencies should consult with their legal counsel regarding the possible impact of the ADA. See also Chapter 15.

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(D) (accountants), -1434(C) (medical doctors). In other cases, the agency may use the more general prohibition against violations of licensing laws, see discussion in 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 various 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. If an agency terminates the investigation or disciplinary proceeding, 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 does not prevent the initiation or completion of disciplinary proceedings, *e.g.*, A.R.S. § 4-210(I) (liquor licenses), or that cancellation may be accepted only if no investigation has been initiated against a licensee, *e.g.*, A.R.S. § 32-1433 (medical doctors). 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 but instead is suspended until the charge is resolved. A.R.S. § 32-3202.

**9.8 Renewal and Reinstatement.** Most licensing statutes contain procedures for the regular renewal of active licenses and for the reinstatement of licenses that may have been suspended or revoked. Agencies should 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 and that an established fee be paid. The time period, renewal procedures, and the required fee vary 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 reactivating a license also differ. Upon failure to timely renew, a license may be forfeited, voided, suspended, or deactivated, or it may simply expire. *Compare* A.R.S. § 32-1236(D) (dentists) *with* A.R.S. §§ 32-518(A) (cosmetologists), -1125(A) (contractors), -1331(D), and -1430(A) (medicine).

The requirements for reactivating or reissuing 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(C) (accountants). Additionally, proof of qualifications or competence may be required. *E.g.*, A.R.S. § 32-1642(C) (nurses). Where the failure to renew extends over a considerable period (a year or years, depending on the particular statute involved), reexamination may be imposed or a reapplication, as if for original
licensure, may be necessary. E.g., A.R.S. §§ 32-1236(D) (dentists), -1430(D) (medical doctors).

9.8.2 Reinstatement of License. Where a license has been suspended or revoked as a result of disciplinary action by an agency, reinstatement is necessary if the licensee wants to reenter practice. Some statutes vest broad discretion in the agency to reinstate licenses. E.g., A.R.S. §§ 32-1664(O) (nurses), -1928(D) (pharmacists). Other laws require a demonstration of "good cause," e.g., A.R.S. § 32-748(A) (accountants), or verification that the licensee has removed the basis of the suspension or revocation. A.R.S. § 32-1552(A)(1) (naturopathic doctors). 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) (nurses), -1748(C) (optometrists). 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. An agency may have the authority to take disciplinary action or to refuse to issue or renew a license if the licensee or applicant has been convicted of a felony or crime of moral turpitude. Convictions resulting from a plea of no contest or nolo contendere do not deprive an agency of authority to act. See Bear v. Nicholls, 142 Ariz. 560, 562, 691 P.2d 326, 328 (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. Id. at 562, 691 P.2d at 328; see also A.R.S. § 32-572(D) (cosmetologists).

9.9.2 Restoration of Civil Rights. By statute, a felony conviction automatically results in the suspension of certain civil rights of the person convicted. A.R.S. § 13-904(A). However, in some cases, a person may have his civil rights restored or his conviction set aside. A.R.S. §§ 13-905 to -912.01.

If the statutes regulating the licensing functions of an agency list conviction of a felony as a disqualification, that agency should require persons applying for the issuance, renewal, or reinstatement of a license to disclose prior felony convictions, even if the person's civil rights have been restored or those convictions have been set aside. See Ariz. Att'y Gen. Ops. I78-181, I83-042; Section 9.6.2.

When making a licensing decision, an agency may consider a conviction even if a person has had his civil rights restored. A.R.S. § 13-904(E). An agency may also consider a conviction which has been set aside or situations in which civil rights have been restored pursuant to A.R.S. § 13-907. Ariz. Att'y Gen. Ops. I78-181, I83-042.

However, if civil rights have been restored, the agency may not deny that person a license merely because the conviction exists. A.R.S. § 13-904(E). In this situation, the conviction can only be a basis for an agency's licensing decision if the offense has
“a reasonable relationship to the functions of the . . . occupation for which the license . . . is sought.”  *Id.*; *see also* Ariz. Att'y Gen. Ops. I78-181, I83-042. Thus, when a conviction has been set aside or civil rights restored, conduct sufficient to deny one license may be wholly unrelated to the functions associated with another license. For example, a conviction for forgery, a class 4 felony, may support the refusal of a notary public commission by the Secretary of State, because the conduct underlying such a conviction bears a reasonable relationship to the functions a notary public is expected to perform.  *See* Ariz. Att'y Gen. Op. I79-305. However, the same conviction may not support denial of a barber's license, because there is no reasonable relationship between the forgery offense and hair cutting.

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. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896 (1974). Federal law specifically provides that agencies whose functions involve the administration of taxes, benefit dispensation, driver's licensing, or motor vehicle registration may require disclosure of social security numbers. 42 U.S.C. § 405(c) (2)(C). However, state agencies that issue professional, recreational, or occupational licenses may require that social security numbers be provided on their applications and may transmit that information to the Department of Economic Security to aid in child support enforcement. *See* A.R.S. § 25-320(P). In addition, state statutes or rules adopted prior to January 1, 1975 authorizing an agency to require the disclosure of social security numbers may be enforced. Privacy Act of 1974.

Those agencies that may not require the disclosure of a social security number may request its voluntary disclosure. The form requesting this disclosure must include written notice 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. *Id.*; *see* Ariz. Att'y Gen. Ops. 78-185, 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, a fine of $5,000, or both. *See* 5 U.S.C. § 552a(i)(1).

9.9.4 Access to Criminal History Record Information. The Legislature substantially changed the state law concerning criminal history record information, A.R.S. § 41-1750, in 1992 and again in 1993. *See, e.g.*, A.R.S. § 41-1750(G)(2) (concerning agency access to criminal history records of applicants for licenses). Because of these changes and the possibility of future amendments to A.R.S. § 41-1750, agencies should consult with their legal counsel regarding access to criminal history record information. Agencies that have the authority to receive criminal history...
record information from the Department of Public Safety (DPS) or other criminal justice agencies should be aware of the following:

1. DPS restricts access to criminal history record information and the uses for such information are limited by statute. See A.R.S. § 41-1750. Consequently, any criminal history record information or "rap sheet" received from DPS or another criminal justice agency may be used only for the purpose of evaluating an applicant's fitness for a license or employment.

2. If, in the course of the processing of a license application, an agency must hold a public hearing, the criminal history record information obtained from DPS or another criminal justice agency may not be used or disclosed at the hearing. Instead, the agency must obtain certified copies of the conviction from the respective courts for use as evidence in the hearing.

3. An agency authorized to receive criminal history record information from DPS must enter into a "user agreement" with 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 DPS or another law enforcement agency should not be disclosed or provided to any person outside the agency or 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 DPS user agreement. The wrongful release, procurement, or use of criminal history record information for an unauthorized purpose is a criminal offense. A.R.S. § 41-1756.

**9.10 Antitrust Considerations for Licensing Agencies.** Licensing agencies could restrain competition by unreasonably limiting entry into a trade or profession. Although such restraint may be compelled by an agency's statutory scheme, the agency and its employees are not entirely exempt from antitrust scrutiny. Licensing denials may be challenged based on allegations that the regulating agency is a party to a conspiracy with private parties to restrain trade. The agency decision, however, will be immune to challenge under the federal antitrust laws, unless the agency itself is acting as a commercial participant in a given market and not as a regulator. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374-378 (1991). For additional discussion of the immunity under the antitrust laws for “state action,” see Sections 5.9.6, 5.9.6.1.
Like procurement officers, licensing employees have a responsibility to avoid actions that unnecessarily restrain trade. It is not the function of licensing officers to protect market positions of persons or firms within an industry, to regulate the number of competitors in a particular field, or, absent a clear statutory directive, to regulate prices. Any questions about antitrust laws should be directed to the Antitrust Unit of the Attorney General's office.

9.10.1 Restrictions on Price Competition. The antitrust laws may prohibit restrictions on price competition. The agency should request Attorney General review of any regulation that has a restrictive effect on price competition and that is not expressly required by statute. Examples of regulations that restrict price competition include fee schedule mandates, prohibitions against price advertising, and prohibitions against competitive bids.

9.10.2 Barriers to Entry. Entry requirements that must be satisfied in order to obtain a license to engage in a profession or occupation are called "barriers to entry." Because a requirement that unnecessarily restricts entry restrains competition and may violate antitrust laws, licensing agencies should ensure that the restraint imposed is no greater than necessary to protect the public. This is especially true if members of the licensing authority are also members of the regulated profession.

9.11 Immigration-Related Laws. The Legislature has enacted a number of laws that require agencies to consider immigration-related matters in carrying out licensing activities. See, e.g., A.R.S. § 41-1080. These laws change frequently and raise complicated issues involving an applicant or license holder’s legal status under immigration law. Because of the possibility of future amendments to these laws and the complexity of the subject matter, agencies should consult with their legal counsel regarding the impact of such laws on the agencies' activities.
CHAPTER 10
ADMINISTRATIVE ADJUDICATIONS

Table of Contents

Section 10.1  Scope of this Chapter
Section 10.2  The APA's Application to Administrative Adjudications
  10.2.1  Definition of “Agency” and Statutory Exemptions
  10.2.2  Administrative Adjudications Requiring Application of the APA
    10.2.2.1  Contested Cases
    10.2.2.2  Appealable Agency Actions
    10.2.2.3  Determining Whether “Legal Rights, Duties or Privileges” Are Affected
  10.2.3  Possible Exception from the APA for Jurisdictional Decisions
  10.2.4  Waiver of Procedural Rights in the APA
Section 10.3  Determining Whether a Hearing is Required Prior to Action
Section 10.4  Deciding Whether to Apply Article 6 or Article 10 of the APA
  10.4.1  General Background
  10.4.2  Application of Article 10 to Most State Agencies
    10.4.2.1  Exemptions from Application of Article 10
Section 10.5  Administrative Adjudications Under the APA - An Overview
  10.5.1  Types of Administrative Adjudications Under the APA
    10.5.1.1  Disciplinary and Enforcement Proceedings
    10.5.1.2  Summary Suspension of License
    10.5.1.3  Appealable Agency Actions

Revised 2011
10.5.1.4 Other Administrative Adjudications

10.5.2 Quasi-Judicial Nature of the Administrative Adjudications

10.5.3 Minimum Rights of the Parties under the APA

10.5.3.1 Opportunity for a Hearing after Reasonable Notice

10.5.3.2 Right to Present Evidence and Cross-Examine

10.5.3.3 Right to Counsel

10.5.3.4 Final Decision Based Solely on the Record

10.5.3.5 Rehearing and Review

10.5.4 Agency Adoption of Rules of Practice

10.5.5 Informal Disposition of Complaints

10.5.6 The Regulatory Bill of Rights - Application to Administrative Adjudications

Section 10.6 Parties to the Proceeding

10.6.1 General Definition

10.6.2 Agency Initiated Proceedings

10.6.2.1 Disciplinary and Enforcement Proceedings

10.6.3 Appealable Agency Actions

10.6.4 Party Representation

10.6.4.1 Representation by Layperson

10.6.4.2 Representation by Attorney Not Admitted to State Bar of Arizona

10.6.5 Intervention

10.6.5.1 Intervention as of Right

10.6.5.2 Discretionary Intervention

Revised 2011
Section 10.7  Initial Procedures for Article 10 Appealable Agency Actions

10.7.1  Initiating the Process for Appealable Agency Actions

10.7.1.1 Appeal in the Absence of Notice - DEQ Actions

10.7.2  The Notice of Appeal

10.7.3  Notice of the Proceeding

10.7.4  Informal Settlement Conference

10.7.5  Burden of Proof for Appealable Agency Actions

10.7.6  Necessity of Filing Notice of Appeal to Preserve Judicial Review

Section 10.8  Initial Procedures for Contested Cases

10.8.1  Initiating the Process

10.8.2  Notice of the Proceeding

10.8.2.1 Purpose of the Notice

10.8.2.2 Form and Contents of the Notice

10.8.3  Service of the Notice

10.8.4  Timing of Service - Notice of Hearing

10.8.5  Response to the Complaint and Notice

Section 10.9  Hearing Procedures Generally Applicable to Administrative Adjudications

10.9.1  Initiating the Process

10.9.2  Deciding When the Hearing Must Be Held - Time Requirements for Hearings

10.9.2.1 Time to Hold Hearing for Appealable Agency Action

10.9.2.2 Time to Hold Hearing for Contested Case

10.9.2.3 Accelerating a Hearing in Article 10 Cases

Revised 2011
10.9.3 Use of OAH Administrative Law Judges or Hearing Officers
10.9.3.1 General Information - Deciding Who Will Conduct the Hearing
10.9.3.2 Article 10 - Use of OAH
10.9.3.3 Article 6 - Use of Hearing Officers
10.9.3.4 Duties of the Administrative Law Judge or Hearing Officer
10.9.4 Impartiality of the Presiding Official or Decision Maker - Procedures to Protect
10.9.4.1 Disqualification of the Presiding Official or Board Member
10.9.4.2 Procedures for Disqualification
10.9.4.3 Effect of Disqualification on the Quorum Requirement
10.9.4.4 Ex Parte Communications
10.9.5 Pre-Hearing Conferences and Stipulations
10.9.5.1 Pre-Hearing Conferences
10.9.5.2 Stipulations
10.9.6 Discovery
10.9.6.1 Disclosure of Witnesses and Exhibits
10.9.6.2 Disclosure of Investigative Materials
10.9.7 Motions
10.9.7.1 Use of Motions
10.9.7.2 Responses to Motions
10.9.7.3 Arguments on Motions
10.9.7.4 Disposition of Motions
10.9.8 Subpoenas

Revised 2011
10.9.8.1 Types of Subpoenas
10.9.8.2 Subpoena Authority
10.9.8.3 Application for Issuance of a Subpoena
10.9.8.4 Objections To and Enforcement of the Subpoena
10.9.9 Conducting the Hearing
10.9.9.1 The Presiding Officer
10.9.9.2 Hearing Officers and Decision Makers - Standards of Conduct
10.9.9.3 Party Standards of Conduct
10.9.9.4 Application of Open Meeting Law
10.9.9.5 Maintaining a “Record” of the Proceeding
10.9.9.6 Interpreters
10.9.9.7 Order of Proceedings
10.9.9.7.1 Convening the Hearing
10.9.9.7.2 Deciding Whether to Exclude Non-party Witnesses
10.9.9.7.3 Stipulations
10.9.9.7.4 Opening Statements
10.9.9.7.5 Order of the Presentation of Evidence
10.9.9.8 Evidence
10.9.9.8.1 Forms of Evidence
10.9.9.8.2 Oaths and Affirmations
10.9.9.8.2.1 Use of Depositions as Evidence
10.9.9.8.3 Objections to Evidence

Revised 2011
10.9.9.8.4 Relevant/Probative Evidence
10.9.9.8.5 Hearsay
10.9.9.8.6 Rules of Privilege
10.9.9.8.6.1 The Fifth Amendment Privilege
10.9.9.8.7 Exclusion of Evidence
10.9.9.8.8 Exhibits
10.9.9.8.9 Notice of Judicially Cognizable Facts and Technical and Scientific Facts
10.9.9.8.10 Expert Testimony
10.9.9.9 Burden of Proof
10.9.9.9.1 Standard of Proof - Preponderance

Section 10.10 Making the Decision
10.10.1 When the Board Conducts its Own Hearing
10.10.1.1 Findings of Fact and Conclusions of Law
10.10.2 When the Board Receives a Hearing Officer's Recommended Decision
10.10.2.1 Proceedings Under Article 6
10.10.2.2 Proceedings Under Article 10
10.10.2.2.1 Time Limit for ALJ Decision
10.10.2.2.2 Time Limit to Review ALJ Decision
10.10.2.2.2.1 Final Decision by Agency Head
10.10.2.2.2.2 Final Decision by Board that Meets Monthly or Less Frequently
10.10.2.2.2.3 Date OAH “Sends” Recommended Decision
10.10.2.2.2.4 Time for Delivery of Final Decision to OAH

Revised 2011
10.10.2.3 Argument by Parties Prior to Final Decision on ALJ Recommendations

10.10.2.4 Deciding Final Findings of Fact and Conclusions of Law

10.10.2.4.1 Option One: Affirm/Accept/Decline to Review the Decision

10.10.2.4.2 Option Two: Reject/Modify All or Part of the ALJ's Recommended Decision

10.10.2.4.2.1 Changes to Factual Findings

10.10.2.4.2.2 Changes to Conclusions of Law

10.10.3 Determining Sanctions

10.10.4 Effect of Quorum Requirements on Decision Making

10.10.4.1 Failure to Obtain a Majority Vote

10.10.4.2 Effect of a Tie Vote

10.10.5 Informal Disposition of Claims

Section 10.11 Form of the Decision

10.11.1 Changes to OAH Administrative Law Judge's Recommended Decision

10.11.2 Providing Notice of Rehearing Requirement for Judicial Review

Section 10.12 Effectiveness of the Decision

10.12.1 Article 6 Cases

10.12.2 Article 10 Cases

Section 10.13 Service of the Decision

Section 10.14 Reconsideration of Decision

10.14.1 Article 6 Procedures

10.14.2 Article 10 Procedures

Revised 2011
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.14.2.1</td>
<td>Time to File Request for Rehearing or Review</td>
</tr>
<tr>
<td>10.14.2.2</td>
<td>Necessity of Request for Rehearing or Review to Preserve Right to Seek Judicial Review</td>
</tr>
<tr>
<td>10.14.2.3</td>
<td>Time for Ruling on Rehearing Motion</td>
</tr>
<tr>
<td>10.14.3</td>
<td>Ability of the Agency Prosecutor to Request Rehearing or Review of an Agency Decision in a Disciplinary or Enforcement Matter</td>
</tr>
<tr>
<td>Section 10.15</td>
<td>Combining Administrative, Investigative, and Prosecutorial Functions with Adjudicatory Functions</td>
</tr>
<tr>
<td>Section 10.16</td>
<td>Dual Functions of the Attorney General</td>
</tr>
<tr>
<td>Section 10.17</td>
<td>Judicial Review</td>
</tr>
<tr>
<td>Section 10.18</td>
<td>Recovery of Costs and Fees and Related to Administrative Adjudications</td>
</tr>
<tr>
<td>Appendix 10.1</td>
<td>Sample Letter to Nonmember Attorney or Representative</td>
</tr>
<tr>
<td>Appendix 10.2</td>
<td>Model Rule on <em>Ex Parte</em> Communication</td>
</tr>
<tr>
<td>Appendix 10.3</td>
<td>Office of Administrative Hearings - Subpoena Form</td>
</tr>
</tbody>
</table>
CHAPTER 10

ADMINISTRATIVE ADJUDICATIONS

10.1 Scope of this Chapter. Arizona’s Administrative Procedure Act (APA), A.R.S. §§ 41-1001 to -1092.12, establishes the minimum procedures that must be followed for two important functions of most departments, boards and agencies - rule making and administrative adjudications. The rule making provisions of the APA are described in Chapter 11. This Chapter addresses only administrative adjudications.

Specifically, this Chapter describes the procedures that state administrative agencies follow in adjudicating “contested cases” or “appealable agency actions,” which are defined in the APA as actions that affect “the legal rights, duties, and privileges” of individual parties. A.R.S. § 41-1001(4)(defining contested case); A.R.S. § 41-1092(3)(defining appealable agency action). See also Chapter 12 (Enforcement). When appropriate, these procedures are referred to generically throughout this Chapter as “administrative adjudications.”

Caveat: There are two possible schemes by which an agency must conduct administrative adjudications, and it is critical to determine which scheme applies. See Section 10.4. Every agency must follow the statutory scheme in either Article 6 of the APA, A.R.S. §§ 41-1061 through -1067 (titled “Adjudicative Proceedings”), or Article 10 of the APA, A.R.S. §§ 41-1092 through -1092.12 (titled “Uniform Administrative Hearing Procedures”), when conducting administrative adjudications. For ease of reference, this Chapter will refer to these statutory schemes as either “Article 6” or “Article 10.” The vast majority of agencies will be governed by Article 10.

There are many differences between the procedures required by Article 6 and Article 10. For example, Article 10 requires an agency to hold hearings for “appealable agency actions,” while Article 6 does not use that term. If an agency is required to follow Article 10 (as most agencies are), it should not apply the statutory scheme and terminology in Article 6. Conversely, if an agency is exempt from Article 10, it should conduct its administrative adjudications under the statutes and terminology in Article 6.

Additional Caveat: Nearly all administrative adjudications conducted by state agencies are subject to the APA, and the APA supersedes any other statute that would diminish a right provided in the APA, unless a statute expressly provides otherwise. A.R.S.§ 41-1002 (B). Consequently, this Chapter will focus on describing the APA’s minimum requirements. However, the APA also specifically states that agencies may grant procedural rights greater than those granted by the APA, so long as those rights do not substantially prejudice the rights of others. See A.R.S. § 41-1002(B), (C). You must, therefore, review an agency’s specific statutes and rules to determine if any rights differ from those described in this Chapter.
10.2 The APA’s Application to Administrative Adjudications. As noted in the “caveat” to Section 10.1, it is critical for an agency to determine if Article 6 or Article 10 of the APA applies to the administrative adjudications it conducts. (See also Section 10.4.) Before determining which Article to apply, however, it is first necessary to review the definitions of certain key words and phrases used in the APA generally to determine if an agency action requires application of APA procedures at all. See A.R.S. §§ 41-1001 and -1092. Some entities may also be statutorily exempt from the APA altogether.

10.2.1 Definition of “Agency” and Statutory Exemptions. The APA defines the term “agency” as “any board, commission, department or other administrative unit of this state, including the agency head and . . . other persons directly or indirectly purporting to act on behalf or under the authority of the agency head, whether created under the Constitution of Arizona or by enactment of the legislature.” A.R.S. § 41-1001(1). This definition is broad enough to include almost every state entity that exists. This definition controls over all other statutes in determining whether an entity is an “agency” for purposes of the APA, including the organic laws of that entity. See Thompson v. Tucson Airport Auth., 163 Ariz. 173, 786 P.2d 1024, 1025 (App. 1989).

The APA’s definition of “agency” exempts several entities from its application, including the legislature, the courts, the governor, and all political subdivisions of the State and any administrative units of a political subdivision. A.R.S. § 41-1001(1). Additionally, A.R.S. § 41-1005 specifically exempts any order of the Arizona Game and Fish Commission to open, close or alter seasons or establish bag or possession limits for wildlife, and orders of the Director of Water Resources adopting or modifying a management plan under A.R.S. § 45-561 et seq. See A.R.S. §§ 41-1005(A)(2) and (11).

If a board, commission, department, officer or other administrative unit is created or appointed by the joint or concerted action of a state entity (which is covered by the APA), and a political subdivision (which is exempt), the entity is considered an “agency” for APA purposes. A.R.S. § 41-1001(1).

If you have any question about whether your entity is an “agency” under the APA, you should seek advice from your legal counsel.

10.2.2 Administrative Adjudications Requiring Application of the APA. Both Article 6 and 10 of the APA refer to “contested cases.” Article 10 of the APA includes the additional concept of the “appealable agency action.” These terms are defined specifically to apply to different types of agency decisions. Each of these definitions, however, restricts the application of the procedures required by the APA to situations when an agency is called upon to determine the “legal rights, duties or privileges of a party.” This subsection examines the meaning of these key phrases.

10.2.2.1 Contested Cases. Both Article 6 and Article 10 of the APA use the term “contested case,” which is defined to include “any proceeding, including rate making, price
fixing and licensing, in which the legal rights, duties or privileges of a party are required or permitted by law . . . to be determined by an agency after an opportunity for an administrative hearing.” A.R.S. § 41-1001(4). The APA defines “licensing” to include those cases “respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license.” A.R.S. § 41-1001(12).

10.2.2.2 Appealable Agency Actions. Article 10 of the APA defines an “appealable agency action” as “an action that determines the legal rights, duties or privileges of a party and that is not a contested case.” A.R.S. § 41-1092(3). A hearing on an appealable agency action occurs after a decision is rendered by an agency and only when the hearing is requested by a party with standing to challenge the decision. See A.R.S. § 41-1092.03. Also, a hearing on an “appealable agency action” occurs only if an agency is governed by Article 10 of the APA.

The definition of “appealable agency action” exempts several actions, including: (a) “interim orders by self-supporting regulatory boards” (see A.R.S. § 41-1092(7) for a list of self-supporting regulatory boards), (b) “rules, orders, standards or statements of policy of general application issued by an administrative agency to implement, interpret or make specific the legislation enforced or administered by it,” and (c) rules “concerning the internal management of the agency that do not affect private rights or interests.” A.R.S. § 41-1092(3). An agency’s organic statutes may also exempt application of the procedures for a decision that might otherwise be considered an appealable agency action. See, e.g., A.R.S. § 8-811 (applicable to certain DES decisions).

10.2.2.3 Determining Whether “Legal Rights, Duties or Privileges” Are Affected. The APA does not define the term “legal rights, duties or privileges.” In general, the federal and state constitutions, together with Arizona statutes and rules, determine the existence of legal rights, duties, or privileges.

The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Arizona Constitution, which both provide that “[n]o person may be deprived of life, liberty, or property without due process of law,” require a formal hearing before an agency can take away a person’s property interest, such as an existing license to practice a profession. See Schillerstrom v. State, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994). Due process, however, is not a technical concept with fixed requirements, but is instead flexible, calling only for those procedural protections demanded by the particular situation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). See also Comeau v. Arizona State Bd. of Dental Exam’rs, 196 Ariz. 102, 107, 993 P.2d 1066, 1071 (App. 1999). Thus, for example, the APA does not apply to a decision by the Board of Medical Examiners to issue an “advisory letter of concern,” which notifies a physician that “while there is insufficient evidence to support disciplinary action, the board believes the physician should modify or eliminate certain practices.” See Murphy v. Bd. of Medical Exam’rs, 190 Ariz. 441, 448-49, 949 P.2d 530, 537-38 (App. 1997)(interpreting A.R.S. § 32-1401(14)). The court found that the doctor’s allegations of harm resulting from the board's issuance of the non-disciplinary
letter of concern were speculative and involved no property rights triggering due process. *Id.* at 448, 949 P.2d at 537. The court also noted that alleged harm to reputation, standing alone, does not trigger due process. *Id.* at 449, 949 P.2d at 538 (citing *Paul v. Davis*, 424 U.S. 693, 711-12 (1976)).

In some situations in which due process may not necessarily require a full hearing before an agency decision, Arizona law creates such a right by statute or rule. For example, Arizona law allows citizens who have no “property” at stake to challenge certain decisions of the Arizona Department of Environmental Quality. See, e.g., A.R.S. § 49-428(A). This statutory grant of a procedural right constitutes the type of “legal right, duty or privilege” to which the APA applies.

An agency may also create a right to a hearing by its rules. Whether the APA applies will depend on the language of the rule and the context of the agency decision. For example, the Arizona Court of Appeals considered the unique nature of a prison setting in holding that an inmate disciplinary hearing is not a “contested case” within the meaning of the APA. *Rose v. Ariz. Dept. of Corrections*, 167 Ariz. 116, 120, 804 P.2d 845, 849 (App. 1991).

In general, questions about the requirement of a full hearing under the APA should be resolved in favor of affording a party a hearing.

**10.2.3 Possible Exception from the APA for Jurisdictional Decisions.** The APA controls procedures regarding decisions that go to the merits of a matter involving the “legal rights, duties or privileges” of a party. However, the Arizona Court of Appeals has held that the procedures of the APA do not apply to the initial inquiry by an agency concerning the agency’s jurisdiction to review a matter. *Stoffel v. Ariz. Dept. of Econ. Sec.*, 162 Ariz. 449, 450-51, 784 P.2d 275, 276-77 (App. 1989). The court reasoned that an agency’s decision concerning jurisdiction to review a matter involves a matter of “internal management,” exempt from the APA under A.R.S. § 41-1005(A)(4). This decision may not apply, however, to those agencies that are governed by Article 10 of the APA, because the statutory definition of appealable agency actions exempts an internal management decision only if it does not “affect private rights or interests.” A.R.S. § 41-1092(3). Under this more recent statute, an agency’s jurisdictional decision may be considered an appealable agency action if it affects someone’s private rights or interests.

**10.2.4 Waiver of Procedural Rights in the APA.** “Except to the extent precluded by another provision of law, a person may waive any right conferred on that person by [the APA].” A.R.S. § 41-1004. The “provision of law” that can preclude a waiver is broadly defined to include the “federal or state constitution, or any federal or state statute, rule of court, executive order or rule of an administrative agency.” A.R.S. § 41-1001(16).

**10.3 Determining Whether a Hearing is Required Prior to Action.** The APA contemplates that hearings may occur either before or after an agency makes a decision.
that determines a “right, duty or privilege.” See Article 6: A.R.S. § 41-1001(4) (contested cases for pre-decision hearings), and A.R.S. § 41-1065 (post-decision hearing on denial of application for license); Article 10: A.R.S. § 41-1092.11(B) (decision revoking or taking other action affecting rights of license-holder unlawful unless preceded by a hearing), and A.R.S. §§ 41-1092(3) and -1092.03 (appealable agency actions for post-decision hearings). As a general rule, a hearing occurs upon request of a party after an agency decision when the agency is deciding whether or not to grant a privilege, and a hearing must occur before an agency decision when the agency is deciding whether to alter or annul a privilege that has already been granted.

Thus, both Article 6 and Article 10 of the APA specifically provide that “[n]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with [the APA].” See A.R.S. § 41-1064(C); A.R.S. § 41-1092.11(B). This statutory requirement is consistent with principles of due process, which generally require an opportunity for a hearing before a decision is made to revoke an existing property right or privilege. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); State v. O’Connor, 171 Ariz. 19, 23, 827 P.2d 480, 484 (App. 1992). This provision does not address whether a hearing is required prior to the imposition of civil penalties on a person who holds a license. Some agencies treat the imposition of civil penalties as an appealable agency action and hold a hearing upon request by the licensee. See A.R.S. § 41-2115(A) (Department of Weights & Measures). Other agencies treat the matter as a contested case and impose civil penalties only after an administrative proceeding. A.R.S. § 32-1451(K) (Arizona Medical Board). If you have any question about whether a hearing should be held before or after imposing a sanction other than those listed above, you should seek advice from your legal counsel.

Conversely, if the decision is whether to grant a property right or privilege (e.g., a license), then the hearing need not be held until after the decision is made, and only upon the request of the person affected. See A.R.S. § 41-1065 (hearing on denial of license); A.R.S. § 41-1092.03 (appealable agency actions). In such cases, the party requesting the hearing has the burden of proof. See A.R.S. § 41-1065; A.R.S. § 41-1092.07(G)(1); A.A.C. R2-19-119 (rules of the Office of Administrative Hearings establishing the burdens of proof).

Also, the organic statutes of the agency making a decision will frequently require that a hearing be held prior to a decision. See, e.g., A.R.S. § 32-1451(J) (Board of Medical Examiners statute requiring referral of a case to a formal adjudication before a license to practice medicine may be revoked). Such matters should be treated as a contested case and a hearing must be held before any action is taken. See A.R.S. § 41-1001(4) (defining contested case as any proceeding in which legal right must be determined after the opportunity for a hearing).

There are some recognized exceptions to the requirement that a hearing must be held prior to taking action against a “legal right, duty or privilege.”
1. **Summary Proceedings.** In certain instances, state law allows an agency to take action without first holding a hearing. These proceedings are usually referred to as “summary proceedings.” In most cases, action taken without a prior hearing must be promptly followed by a hearing that affords the party an opportunity to present its side of the case. For example, both A.R.S. §§ 41-1064(C) and 41-1092.11(B) provide for summary suspensions: “[i]f the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order,” the agency may summarily suspend a license pending formal “proceedings for revocation or other action.” These statutes also provide that the agency must promptly institute further proceedings and decide the case. Although the courts have not provided a specific time period that satisfies the promptness requirement, the hearing must be held less than sixty days after the summary action. *Dahnad v. Buttrick*, 201 Ariz. 394, 400, ¶24, 36 P.3d 742, 748 (App. 2001) (finding commencement of hearing nearly sixty days after summary action violates due process).

Such provisions of law, however, should be balanced against the constitutional rights of the licensee, and the decision to proceed without a hearing should be made with great caution. In addition, where summary action is necessary but notice can be provided to the affected party without jeopardizing the public health, safety, or welfare, the agency should try to notify the affected party in the form most practicable under the circumstances. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544 (1985). If the agency provides notice and an opportunity to attend a public meeting to institute a summary action, upon request, the licensee must be allowed to address the agency regarding the allegations. A.R.S. § 32-3108; *Dahnad*, 201 Ariz. at 399, ¶21, 36 P.2d at 747.

2. **Failure to File.** A hearing is not required when the agency's action is based solely upon the failure of a person to timely file a required report, application, or other material, to pay required fees, or maintain required bonds or insurance. *See Estate of Miner v. Commercial Fisheries Entry Comm'n*, 635 P.2d 827, 834 (Alaska 1981). For example, the statutes governing the practice of chiropractic medicine in Arizona allow the Board to automatically suspend a license for failure to pay the renewal fee and to reinstate the license once the licensee pays the statutory late fees. A.R.S. § 32-923(C).

3. **Non-discretionary Acts.** A hearing is not required when agency action is mandated by law, such as actions involving the suspension of a driver’s license upon certain traffic-related convictions. *See Thomson v. Miller ex rel. Highway Dep't*, 163 Ariz. 461, 462, 788 P.2d 1212, 1213 (App. 1989).
10.4 Deciding Whether to Apply Article 6 or Article 10 of the APA.

10.4.1 General Background. Before 1995, only Article 6 of the APA (A.R.S. §§ 41-1061 through -1067) governed administrative adjudications for Arizona administrative agencies. However, in a gradual process that began with legislation creating the Office of Administrative Hearings (OAH) in 1995, most administrative adjudications in Arizona are now governed by Article 10 of the APA, found at A.R.S. §§ 41-1092 through -1092.12. Although many of the basic principles are the same, there are differences in the procedures required by Article 6 and Article 10. Furthermore, only one of the Articles will apply to each agency -- Article 6 or Article 10. Thus, before conducting any administrative adjudication, it is critical to determine if the agency is governed by Article 6 or Article 10.

10.4.2 Application of Article 10 to Most State Agencies. Unless expressly exempted by A.R.S. § 41-1092.02(A), every State agency in Arizona is required to apply Article 10 of the APA to conduct all contested cases and appealable agency actions. See A.R.S. § 41-1092.02(D). Also, A.R.S. § 41-1092.02(B) indicates that the procedural rules established by the Director of OAH apply to all hearings conducted under Article 10. Thus, even if an agency chooses not to use OAH to conduct its hearings, and instead conducts the hearing itself under the authority of A.R.S. § 41-1092.01(F), the agency must apply the procedures in Article 10 and should follow the rules created by OAH for Article 10 hearings. In addition, an agency’s organic statutes may require application of Article 10 and the use of OAH as the administrative law judge for the hearing. See, e.g., A.R.S. § 8-811(H).

Article 6, on the other hand, now applies only to contested cases of agencies that are exempt from Article 10, as provided by A.R.S. § 41-1092.02(A). See A.R.S. § 41-1067.

10.4.2.1 Exemptions from Application of Article 10. The only agencies exempt from Article 10 of the APA are listed in A.R.S. § 41-1092.02(A). They include:

1. The Arizona Department of Corrections;
2. The Board of Executive Clemency;
3. The Industrial Commission of Arizona;
4. The Arizona Corporation Commission;
5. The Arizona Board of Regents and institutions within its jurisdiction;
6. The State Personnel Board;
7. The Department of Juvenile Corrections;
8. The Department of Transportation;

9. The Department of Economic Security (except as noted in A.R.S. §§ 8-506.01, 8-811, and 46-458);

10. The Department of Revenue for all matters regarding income tax, withholding tax, estate tax, or any tax issue related to information associated with the reporting of these taxes;

11. The Board of Tax Appeals;

12. The State Board of Equalization;

13. The State Board of Education, but only in connection with contested cases and appealable agency actions related to applications for issuance or renewal of a certificate and discipline of certificate holders pursuant to sections 15-203, 15-534, 15-534.01, 15-535, 15-545 and 15-550; and

14. The Arizona Board of Fingerprinting.

Also, A.R.S. § 41-1092.02 exempts some agencies from certain parts of Article 10:

-- Subsection (E) exempts the Department of Revenue from A.R.S. §§ 41-1092.03, -1092.08, and -1092.09, unless the case involves unclaimed property.

-- Subsection (F) exempts the Board of Appeals for the Land Department, established by A.R.S. § 37-213, from the time frames for hearings and decisions in A.R.S. § 41-1092.05(A), A.R.S. § 41-1092.08, and A.R.S. § 41-1092.09.

Finally, the Arizona Peace Officer Standards and Training Board is exempt only from the application of A.R.S. § 41-1092.08. See A.R.S. § 41-1092.08(I).

10.5 Administrative Adjudications Under the APA - An Overview.

10.5.1 Types of Administrative Adjudications Under the APA.

10.5.1.1 Disciplinary and Enforcement Proceedings. State agencies most commonly use formal administrative hearings to determine whether disciplinary or enforcement actions should be taken against persons they license or otherwise regulate. After a formal notice of the allegations is given to the licensee (Respondent), the agency, through its board, agency head, or hearing officer, takes evidence. The agency must then
make findings of fact, conclusions of law, and an order based on the evidence presented at the hearing.

The agency may deny, suspend, or revoke a license, or impose other sanctions, such as ordering payment of civil penalties or issuing censures, remedial prohibitions, or cease and desist orders. The sanctions available depend on what is allowed by the agency's organic statutes.

10.5.1.2 Summary Suspension of License. If an "agency finds that the public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order," the agency may summarily suspend a license. A.R.S. § 41-1064(C); A.R.S. § 41-1092.11(B). However, proceedings for an administrative adjudication under the APA must be promptly instituted and determined. Id. Dahnad, 201 Ariz. at 400, ¶23, 36 P.3d at 748. Because suspending a license without a prior hearing may impinge on a licensee's constitutional rights, summary action should be taken only when there is a true emergency. For further discussion of summary actions and the constitutional implications, see Section 10.3. If an agency's own statutes or rules provide summary suspension procedures and timetables that are more specific than those in the APA, the agency's scheme should control. See Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1378 (9th Cir. 1989).

10.5.1.3 Appealable Agency Actions. Article 10 of the APA recognizes a type of administrative adjudication called the "appealable agency action," which is defined broadly to include any action that determines the legal rights, duties, or privileges of a party that is not preceded by an opportunity for a hearing. A.R.S. § 41-1092(3). This includes proceedings such as the denial of a license by a regulatory board or a decision by the Land Department Board of Appeals not to approve the sale of state land. When an agency makes a decision that constitutes an appealable agency action, it is required to serve notice on the affected individual, and hold a hearing if requested. A.R.S. § 41-1092.03. The procedures for appealable agency actions are more fully discussed at Sections 10.6.3 and 10.7 through 10.7.6.

10.5.1.4 Other Administrative Adjudications. In addition to enforcement and disciplinary proceedings, some agencies conduct administrative adjudications of a different nature. Rate hearings before the Corporation Commission involve a determination by the commission of the appropriate rates to be charged by public service corporations. Agencies, such as the Department of Economic Security, or the Arizona Health Care Cost Containment System, may hold hearings to determine entitlement to benefits. Any hearing conducted by any agency that falls within the definition of a "contested case" or "appealable agency action" is subject to either Article 6 or Article 10 of the APA.

10.5.2 Quasi-Judicial Nature of the Administrative Adjudication. Administrative adjudications are often referred to as "quasi-judicial" proceedings, because, although much less formal, they are similar to judicial proceedings in court. An administrative adjudication
before an agency is not subject to the strict procedural and evidentiary rules applicable in most court proceedings. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(F)(1). Agencies must, however, observe all procedural requirements imposed on them by statute or rule and conduct administrative adjudications in accordance with applicable constitutional due process requirements.

Like a judicial proceeding, the function of an administrative adjudication is twofold. First, the proceeding is used to determine contested issues of fact and law. For example, it is used to decide whether a licensee committed certain acts and, if so, whether those acts violate statutes or rules enforced by the agency. Or, the agency may institute proceedings to determine whether facts exist to justify certain relief requested by a party; for example, whether the facts warrant a rate increase by a utility, or a request for benefits from the Industrial Commission. This portion of the proceeding is the most trial-like of the administrative functions and may be conducted by the agency's decision making body or, if allowed by the agency's statutes or regulations, by a hearing officer appointed to preside over the proceeding. If a hearing officer hears the evidence, she or he is required to provide recommended findings of facts and conclusions of law to the decision making body of the agency, which may then adopt, amend, or reject them.

Second, an administrative adjudication is used to determine what action is appropriate based on the findings of facts and conclusions of law adopted. For example, an agency may decide to suspend or revoke a license or simply to place a licensee on probation. The agency's decision making body, absent specific statutory authority, may not delegate its final decision making function to a hearing officer although the hearing officer may recommend an appropriate order.

10.5.3 Minimum Rights of the Parties Under the APA. The APA includes certain minimum rights of the parties that are designed to protect due process in administrative adjudications. The following is a general list of the minimum rights required for administrative adjudications. These rights are also discussed more fully throughout this Chapter.

10.5.3.1 Opportunity for a Hearing after Reasonable Notice. Any person who is a party to a proceeding must be provided reasonable notice of the proceeding and an opportunity to appear and be heard. A.R.S. § 41-1061(A); A.R.S. § 41-1092.05(D). The notice must include a statement of the accusations and identify the issues to be resolved in the proceeding. A.R.S. § 41-1061(B); A.R.S. § 41-1092.05(D). See Sections 10.7.3 and 10.8.2 through 10.8.4 for a discussion of notice requirements.

10.5.3.2 Right to Present Evidence and Cross-Examine. Every party to a proceeding has the opportunity to respond and to present evidence on all issues. A.R.S. § 41-1061(C); A.R.S. § 41-1092.07(D). The parties have the right to cross-examine witnesses. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B). See Sections 10.9 generally
and 10.9.9.8 specifically for a discussion of the presentation of evidence in an administrative adjudication.

**10.5.3.3 Right to Counsel.** A party to a proceeding may be accompanied and represented by legal counsel. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B). See Section 10.6.4 for a discussion of attorney representation.

**10.5.3.4 Final Decision Based Solely on the Record.** Parties to an administrative adjudication are entitled to a decision in writing or stated upon the record that is based solely upon the record admitted at the hearing. A.R.S. §§ 41-1063 and -1061(G); A.R.S. §§ 41-1092.07(F)(6) and -1092.08. See Sections 10.10 and 10.11 for a discussion of the final decision for administrative adjudications.

**10.5.3.5 Rehearing and Review.** Except when good cause exists, an “agency shall provide an opportunity for a rehearing or review of the [agency’s decision] before such decision becomes final.” A.R.S. § 41-1062(B); see also A.R.S. § 41-1092.09. See Section 10.14 for a discussion of rehearing procedures for administrative adjudications.

**10.5.4 Agency Adoption of Rules of Practice.** Prior to the creation of Article 10, the APA required that every agency adopt rules of practice establishing the nature and requirements of all formal procedures available to the public. A.R.S. § 41-1003; see, e.g., A.A.C. R20-4-1201 to -1220 (rules of practice and procedure before the Superintendent of the Department of Financial Institutions). Now, however, those agencies required to follow Article 10 for administrative adjudications must follow the procedures in Article 10 and should follow the rules adopted by OAH. See Section 10.4.2. Thus, an agency’s procedural rules for administrative adjudications should describe only those procedures for decisions that are not covered by Article 10 of the APA. For example, an agency that uses Article 6 should create rules of practice to govern its administrative adjudications. The APA, however, will control any conflict between rules of procedure created by an agency and those in the APA.


**10.5.5 Informal Disposition of Complaints.** Article 10 of the APA specifically provides that “[i]nformal disposition [of a complaint] may be made by stipulation, agreed settlement, consent order or default.” A.R.S. § 41-1092.07(F)(5). Thus, not all allegations of wrongdoing must be resolved by formal proceedings. Many are settled informally between the agency and the licensee or respondent, without the need for a formal hearing. This approach is often desirable when the issues are relatively simple or when there is no factual dispute. Furthermore, resolving a matter informally may be more cost effective. In contested cases, the parties or a hearing officer may request a pre-hearing conference to allow the parties to discuss settlement. See A.R.S. § 41-1092.05(F)(6). The process for
appealable agency actions specifically requires settlement discussions when requested by
the appellant. See A.R.S. § 41-1092.06; Section 10.7.4.

10.5.6 The Regulatory Bill of Rights - Application to Administrative
Adjudications. In 1998, the Legislature added the "Regulatory Bill of Rights" to the APA.
See A.R.S. § 41-1001.01. For the most part, these rights involve the rule making activities
of an agency or simply emphasize the requirements of other statutes requiring certain
procedures for administrative adjudications. The following is a description of the
enumerated "rights" that apply to administrative adjudications:

A person is eligible to be reimbursed for fees and expenses incurred if the person
prevails by adjudication on the merits against an agency in a court proceeding, regarding
Under A.R.S. § 12-348(A)(2), a court may award fees and other expenses to a party that
prevails "by an adjudication on the merits" in 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."

A person is also eligible to receive reimbursement of costs and fees if the person
prevails against an agency in an administrative hearing, as provided in A.R.S. § 41-1007.
See A.R.S. § 41-1001.01(A)(2). In order for such an award of fees to be made by a
hearing officer or administrative law judge, the administrative law judge must find both that
the agency's position was not substantially justified and that the person prevailed as to the
most significant issue or set of issues, absent any intervening change in the law. A.R.S.
§ 41-1007(A). For further information, see Section 10.18.

A person may have the administrative hearing on contested cases and appealable
agency actions "heard by an independent administrative law judge as provided by Articles
6 and 10 of [the APA]." See A.R.S. § 41-1001.01(A)(11).

A person may have an administrative adjudication governed by the uniform
administrative appeal procedures in Article 6 or Article 10 of the APA. See A.R.S. § 41-
1001.01(A)(12).

A person may file a complaint or inquiry with the Office of the Ombudsman -
Citizen's Aid to investigate administrative actions. See A.R.S. § 41-1001.01(A)(18).

10.6 Parties to the Proceeding.

10.6.1 General Definition. The APA 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.” A.R.S. § 41-1001(13).
10.6.2 Agency Initiated Proceedings. Unless otherwise specified by its organic statutes, an agency usually has authority to institute administrative adjudications only regarding (a) those persons to whom it has issued licenses or (b) those who claim a benefit or right under statutes administered by the agency. Some agencies are also 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. For example, the Registrar of Contractors and the Structural Pest Control Board have such powers. A.R.S. §§ 32-1166, -2304(D)(12). Some agencies can also commence enforcement actions against licensed persons who fail to renew the relevant licenses after being informed of a pending investigation of alleged misconduct. See A.R.S. § 32-3202.

When an agency initiates an action that will affect the rights, duties, or privileges of any person, and serves that person with notice of the proceeding, that person becomes known as the "Respondent" and is a party to the proceeding. The respondent may be a natural person, a partnership, a corporation, or some other entity. To determine whether a particular entity may be the subject of the proceeding, consult the specific statutes applicable to the agency.

10.6.2.1 Disciplinary and Enforcement Proceedings. In enforcement and disciplinary proceedings, there are usually two parties: the State or the State agency that brings the charges, and the licensee or respondent against whom the charges have been brought. In many cases the agency brings charges as a result of a complaint filed by a private individual or other entity, but in such cases the complaining person or entity does not normally become a party to the action. However, some agencies hold administrative adjudications based on formal complaints filed by the complainant, who is then a party to the proceeding. See A.R.S. § 32-1155(A) (Registrar of Contractors).

10.6.3 Appealable Agency Actions. In an appealable agency action, there are two parties: the “appellant” who requests a hearing to challenge an appealable agency action and the agency that took the action. See Section 10.7 for a more detailed description of appealable agency actions.

10.6.4 Party Representation. Before the initiation of a formal administrative adjudication, the agency’s case is usually prepared and presented by a member of the agency's staff who investigates and obtains evidence that supports action against the licensee or respondent. After the agency determines to file formal charges, either an agency staff member or the Assistant Attorney General assigned to represent the agency prepares the notice of hearing. The Assistant Attorney General then presents the evidence to the hearing board or officer and makes any argument allowed by the final decision maker.

The licensee or respondent may represent himself or herself at the hearing or may be represented by an attorney. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B). There is
no constitutional right to representation that requires an agency to pay for or appoint legal counsel for a party in an administrative adjudication, even if the party is indigent.

The Arizona Supreme Court has ruled that representing a party before an administrative agency constitutes the practice of law. *Hunt v. Maricopa Cnty. Employees Merit Sys. Comm’n*, 127 Ariz. 259, 262, 619 P.2d 1036, 1039 (1980). The Court has also promulgated a rule stating that only members of the State Bar of Arizona may practice law in Arizona. Ariz. Sup. Ct. R. 33(c). The Supreme Court's rules clearly indicate the Court's intent to regulate the practice of law in administrative proceedings as well as in courts. See Ariz. Sup. Ct. R. 31(d)(11) (permitting layperson to represent parties in certain administrative proceedings). The Court's purpose in regulating the practice of law is to prevent harm to the public and to ensure the accountability of those who represent parties before courts and administrative tribunals. *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 90 Ariz. 76, 87-90, 366 P.2d 1, 8-11 (1961).


Because a corporation is an entity separate from its owners, a corporation may not represent itself. *Ramada Inns, Inc. v. Lane & Bird Advertising, Inc.*, 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967). Therefore, except when authorized by the Supreme Court as identified below, a corporation must be represented by an attorney when appearing before an agency.

The Court has authorized lay representation in administrative proceedings under the following circumstances:

1. *DES matters*. A duly authorized agent (and non-lawyer) 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 the Department of Economic Security. In addition, a duly authorized agent may represent such a party and charge a fee, if an attorney authorized to practice law in this state is responsible for and supervises the agent. A corporate employer can be represented by an officer or employee. Ariz. Sup. Ct. R. 31(d)(1).


3. *Industrial Commission/Arizona Division of Occupational Safety and Health*. A corporate employer may be represented by an officer or other duly

4. **DHS/Ambulance Service.** "An ambulance service may be represented by a corporate officer or employee who has been specifically authorized . . . to represent it in an administrative hearing or rehearing before the Arizona Department of Health Services as provided in [A.R.S.] Title 36, Chapter 21.1, Article 2." Ariz. Sup. Ct. R. 31(d)(6).

5. **DHS/Behavioral Health Services.** A party may be represented by a duly authorized agent, who is not charging a fee, in any administrative appeal proceeding of DHS for behavioral health services, pursuant to A.R.S. § 36-3413. Ariz. Sup. Ct. R. 31(d)(8).

6. **DEQ Matters.** An officer or full-time employee of a corporation may represent the corporation “before the Arizona Department of Environmental Quality in an administrative proceeding authorized under [A.R.S.], Title 49.” The corporation must specifically authorize the officer or employee to represent it in the particular matter, the representation may not be the officer's primary duty, and no extra compensation can be paid for the representation. Ariz. Sup. Ct. R. 31(d)(10).

7. **Matters Before OAH.** In proceedings before OAH, a legal entity may be represented by a full-time officer, partner, member or manager of a limited liability company or employee, provided that the legal entity has specifically authorized the representation in the matter, the representation may not be the officer's primary duty, and no extra compensation can be paid for the representation. Ariz. Sup. Ct. R. 31(d)(11).

8. **AHCCCS Matters.** In any administrative appeal relating to AHCCCS, an individual may appear on his or her own behalf or be represented by a duly authorized agent who is not charging a fee. Ariz. Sup. Ct. R. 31(d)(12).

9. **Department of Revenue Matters.** In any administrative proceeding relating to the Department of Revenue, an individual may appear on his or her own behalf or be represented by a certified public accountant or by an enrolled agent authorized to practice before the IRS. Ariz. Sup. Ct. R. 31(d)(13).

10. **Supervised Law Students.** An Arizona law professor or law student, certified by his or her law school with the Supreme Court as eligible to participate as a clinical law professor or legal intern, may represent a client in proceedings before state agencies and elsewhere with the written consent of the client.
Law students must be under the supervision of a licensed Arizona lawyer. Ariz. Sup. Ct. R. 38(d).

The Arizona Legislature has enacted several statutes that purport to authorize lay representation under other circumstances. In light of the *Hunt* decision, these statutes alone do not authorize non-lawyers to appear and represent others in administrative adjudications. See *Hunt*, 127 Ariz. at 259, 619 P.2d at 1036. In addition, an agency does not have the authority to promulgate rules permitting lay representation unless such representation is permitted by the Arizona Supreme Court. *Id.*

A non-lawyer permitted to represent a party in a particular proceeding is subject to the disciplinary jurisdiction of the Arizona Supreme Court. Ariz. Sup. Ct. R. 46(b).

**10.6.4.2 Representation by Attorney Not Admitted to State Bar of Arizona.** Attorneys who are not members of the State Bar of Arizona may be permitted to represent parties in state courts if they satisfy the requirements for admission pro hac vice. Ariz. Sup. Ct. R. 33(c), 38(a). Attorneys given this permission are subject to the disciplinary jurisdiction of the Arizona Supreme Court. Ariz. Sup. Ct. R. 38(a)(11), 46(b).

A stated intent of the Supreme Court in promulgating and enforcing rules regulating the practice of law is “to safeguard the public from harm associated with unqualified representation.” *Hunt*, 127 Ariz. at 263, 619 P.2d at 1040. The procedure for admission pro hac vice is the Court's chosen method to ensure the quality of legal representation provided to the public by attorneys who are not members of the State Bar of Arizona.

The APA provides that parties to an administrative proceeding have the right to be represented by counsel. A.R.S. §§ 41-1062(A)(1); -1092.07(B). To assist parties in utilizing the counsel of their choice, agencies should allow attorneys who are not members of the State Bar of Arizona to represent parties in administrative proceedings if the attorneys properly file a request and satisfy the admission pro hac vice requirements listed in Rule 38(a) of the Arizona Rules of Supreme Court.

Supreme Court Rule 38(a)(3) and (4) require the non-member attorney to file an “application” to appear, stating under penalty of perjury (1) the title of the case, court, board or agency and docket number in which the nonresident attorney will be seeking to appear pro hac vice, and whether this case is related to or consolidated with a previous matter for which the attorney applied to appear pro hac vice; (2) the attorney’s residence and office address; (3) the names of the courts to which the attorney has been admitted and the dates of admission; (4) that the attorney is in good standing in those courts; (5) the title of any court and any cause in which the applicant has previously sought to appear pro hac vice in the past three years, the date of the application, and whether the application was granted; (6) that the attorney is not currently suspended or disbarred by any court; (7) whether the attorney is currently involved in any pending disciplinary proceedings before any court, agency or organization authorizes to discipline attorneys, and if so, specify the
jurisdiction, nature of the investigation, and contact information for the investigation authority; (8) "whether the attorney has ever been disciplined by any court, agency or other organization authorized to discipline attorneys at law;" (9) the name of each party to the case and contact information for each counsel of record for the parties; (10) a certification that the attorney will be subject to the jurisdiction of the Arizona State Board and other agencies that govern the conduct of attorneys in this state; and (11) that the attorney will review the procedural rules at issue in the case and also will comply with the professional standards imposed on Arizona attorneys. The applicant must also supply the name, address, phone number and written consent of a member of the Arizona Bar with whom the court or opposing counsel may communicate, and on whom papers shall also be served.

Additionally, a statutory grant of power to prescribe rules of practice and procedure impliedly authorizes a quasi-judicial board or commission to prescribe rules governing the procedure for admission of attorneys to practice before it. See Goldsmith v. U. S. Bd. of Tax Appeals, 270 U.S. 117, 122 (1926). See, e.g., A.R.S. § 32-703(B)(5) (Board of Accountancy). Agencies having this power should promulgate a rule requiring attorneys who are not members of the State Bar of Arizona to apply for permission to represent parties before the agency's decision making body. When an attorney who is not a member of the Arizona Bar notifies an agency that he or she plans to represent a party before the agency's decision making body, the agency should promptly notify the attorney of the required procedure. See Appendix 10.1 (Sample Letter to Nonmember Attorney or Representative).

10.6.5 Intervention. Intervention is the procedure by which a person not originally a party to a proceeding requests that she or he be included as a party.

Neither Article 6 nor Article 10 of the APA specifically provides for intervention, although the APA implies that the procedure should be available when it defines a "party" to include those who are "properly seeking and entitled as of right to be admitted as a party." A.R.S. § 41-1001(13). Unless an agency, by statute or rule, has specifically adopted a procedure that allows intervention, a request for intervention should not normally be considered, absent extraordinary circumstances. Several agencies have adopted rules allowing intervention. See, e.g., A.A.C. R20-4-1211 (Department of Financial Institutions). The following are recommended procedures that an agency should consider using if an intervention rule is adopted.

A person who seeks to intervene in a proceeding before an agency must file a motion with the decision making body of 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 on which intervention is sought. The person seeking to intervene should serve a copy of the motion on all parties. The agency should rule on the motion as promptly as possible. Its ruling should clearly identify any limits the agency establishes on the intervenor's rights. If the
motion is granted, the intervenor becomes a party for all purposes for which intervention has been allowed.

10.6.5.1 Intervention as of Right. The statutes and rules applicable to the agency may require that a person be allowed to intervene in an administrative adjudication under certain circumstances. See A.R.S. § 49-323(A) (Water Quality Appeals Board). In such a case, the agency must allow the person to become a party if the person files a timely motion in the proper form and meets the necessary requirements prescribed by statute or rule.

10.6.5.2 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. Some think that allowing persons to intervene in a hearing confuses issues and facts in a case and needlessly delays the proceeding. Others view intervention as valuable, because issues of policy are determined in such cases and intervenors may be able to provide perspectives that help the agency reach an informed and correct decision.

As a general rule, if the agency's statutes or rules permit intervention, the agency should nonetheless 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 that would be substantially affected by the proceeding; 3) the person's interest is not adequately represented by another party to the proceeding; and 4) the intervention would not cause serious delay or disruption, or otherwise burden the hearing process or unfairly prejudice the rights of existing parties. See generally Ariz. R. Civ. P. 24 (rules governing intervention in civil cases in Arizona superior courts).

In cases in which intervention of right is not available, the agency, in its discretion, may deny intervention altogether or it may limit the scope of the intervention.

10.7 Initial Procedures for Article 10 Appealable Agency Actions.

10.7.1 Initiating the Process for Appealable Agency Actions. An agency initiates the process for an appealable agency action by making a decision that constitutes an appealable agency action (such as a license denial or withholding of funds) and then serving a “Notice of Appealable Agency Action” on the affected party. A.R.S. § 41-1092.03(A). The notice must identify the statute or rule that is alleged to have been violated or on which the action is based, and must also specify the nature of the violation, including any conduct or activity that constitutes the violation. Id. For example, if an agency has denied a license to an individual, or withheld funds to which an entity might otherwise be entitled, the notice should state with particularity the statute or rule that gave rise to the decision and the facts that support the decision. The notice must include a description of the party's right to request a hearing within thirty (30) days of service of the notice, as well as the individual's right to request a settlement conference under A.R.S. § 41-1092.06. A.R.S. § 41-1092.03(A) and (B). For the denial of a license application, the
notice must also comply with A.R.S. § 41-1076. See Appendix 10.2 (sample form notice of appealable agency action).

10.7.1.1 Timing for Notice of Appealable Agency Action. Notice of the denial of a license must be made within the time frames set by an agency pursuant to A.R.S. §§41-1072 through -1077. Failure to timely issue the written notice denying a license application can result in severe sanctions. See A.R.S. § 41-1077. There is no specific deadline for providing the notice of appealable agency action on matters not involving license denials. It is recommended, however, that the notice be promptly served so that any possible challenge to an agency decision be resolved as soon as possible.

10.7.1.2 Appeal in the Absence of Notice - DEQ Actions. Under a statute applicable only to actions taken by the Department of Environmental Quality (“DEQ”), a party may seek review of an action taken by DEQ even if the party did not receive a “notice of appealable agency action.” A.R.S. § 41-1092.12. Essentially, the law allows a party to request that DEQ recognize an action as constituting an appealable agency action, and if it does not, to proceed with an appeal as if the action were an appealable agency action. Id. This statute applies very narrowly, and legal counsel should be consulted if a question arises concerning its application.

10.7.2 The Notice of Appeal. A party may obtain a hearing by filing a notice of appeal within thirty (30) days after receiving the notice of appealable agency action. A.R.S. § 41-1092.03(B). The notice of appeal may be filed by the party whose legal rights, duties, or privileges were determined by the agency, or by anyone who is adversely affected by the appealable agency action and who was allowed to comment on the action by law or rule. Id. The notice of appeal must identify the party who is filing the notice, the party's address, the agency involved, and the action being appealed. The notice of appeal shall also contain a concise statement of the reasons for the appeal. Id. If good cause is shown, an agency head may accept an appeal that is not filed timely. A.R.S. § 41-1092.03(C).

10.7.3 Notice of the Proceeding. At least thirty (30) days prior to the hearing, the agency shall prepare and serve a notice of hearing on all parties to the appeal. A.R.S. § 41-1092.05(D). The requirements for the contents and service of the notice are the same as those for contested cases, and are discussed fully in sections 10.8.2, 10.8.3, and 10.8.4. In the case of an appealable agency action, however, there is no “complaint” by the agency. Hence, the notice should simply be called a “Notice of Hearing.” The notice must contain the information required by A.R.S. § 41-1092.05(D). See listing in Section 10.8.2.2. However, because the scope of the hearing is set by the notice of appeal, the short and plain statement of the matters to be decided required by A.R.S. § 41-1092.05(D) can be a simple restatement of the issues raised in the notice of appeal. The agency may also attach a copy of the notice of appeal and incorporate its contents by reference.
10.7.4 Informal Settlement Conference. Article 10 of the APA specifically provides that any person filing a notice of appeal from an appealable agency action has the right to request an informal settlement conference with the agency. A.R.S. § 41-1092.06. If requested, the agency must hold the informal settlement conference within fifteen (15) days after receipt of the request. Id. The request for the informal settlement conference must be in writing and must be filed with the agency no later than twenty (20) days prior to the hearing. If the agency uses OAH as a hearing officer for the appealable agency action, the agency must notify OAH of the request for the informal settlement conference and of the outcome of the conference. Id. A request for an informal settlement conference does not toll the sixty (60) day time period within which OAH must conduct a hearing on an appealable agency action under A.R.S. § 41-1092.05(A)(1). Id.

If an appellant requests an informal settlement conference, “a person with the authority to act on behalf of the agency must represent the agency at the conference.” A.R.S. § 41-1092.06(B). The agency “shall notify the appellant in writing that statements, either written or oral, made by the appellant at the conference, including a written document, created or expressed solely for the purposes of settlement negotiations are inadmissible at any subsequent administrative hearing.” Id. Conversely, the appellant participating in the settlement conference waives the right to object to the participation of the agency representative in any final administrative decision. Id.

10.7.5 Burden of Proof for Appealable Agency Actions. Article 10, which governs appealable agency actions, does not specify which party bears the burden of proof in an appealable agency action. However, in hearings on the denial of a license or permit, or an application for modification thereof, the applicant has the burden of proof. A.R.S. § 41-1092.07(G)(1). Also, when an agency takes action on its own initiative and without prior hearing to “suspend, revoke, terminate or modify” the material terms of a license or permit, the agency has the burden of proof in an appeal of the action. A.R.S. § 41-1092.07(G)(2). In situations where the agency imposes penalties or fees without a prior hearing, the agency has the burden of proof in an appeal of the action. A.R.S. § 41-1092.07(G)(3) OAH has also adopted a rule stating that the party asserting a claim, right, or entitlement has the burden of proof. A.A.C. R2-19-119.

10.7.6 Necessity of Filing Notice of Appeal to Preserve Judicial Review. Article 10 of the APA specifically provides that a person must file a Notice of Appeal from an appealable agency action to preserve the right to judicial review. A.R.S. § 41-1092.08(H).

10.8 Initial Procedures for Contested Cases.

10.8.1 Initiating the Process. The decision to proceed with a contested case will most commonly result from one or more of the following considerations:

1. The agency believes that an action affecting someone's rights, duties, or privileges is possible;
2. A person fails to respond to the agency's letter concerning a complaint, and the agency believes that there are sufficient grounds to justify further action; or

3. An informal hearing or conference has been held but has failed to resolve the issues.

An agency usually initiates an administrative proceeding by issuing a “Complaint and Notice of Hearing” or other similar document, which can be drafted by agency staff or an Assistant Attorney General who represents the agency. The form and purpose of the notice are described in Section 10.8.2.

The initiation of formal proceedings does not mean that the agency has made a final decision or that the respondent is guilty of the charges. The commencement of a proceeding means only that the agency has concluded that there is enough evidence to warrant a formal proceeding. *In re Davis*, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981).

### 10.8.2 Notice of the Proceeding.

#### 10.8.2.1 Purpose of the Notice.
Due process requires that an agency provide adequate notice of the formal administrative adjudication to all parties. *Bell v. Burson*, 402 U.S. 535, 542 (1971). The notice, which is analogous to the complaint filed in a civil action in court, informs the party of the existence and nature of a proceeding affecting his or her individual rights. *Elia v. Ariz. State Bd. of Dental Exam'rs*, 168 Ariz. 221, 228, 812 P.2d 1039, 1046 (App. 1990) (“Due process assures an individual notice of the charges prior to commencement of a hearing so that the person charged has a meaningful opportunity for explanation and defense.”) Failure to give adequate notice may cause a reviewing court to set aside the final decision of the agency. *Ne. Ind. Bldg. & Constr. Trades Council v. NLRB*, 352 F.2d 696, 700 (D.C. Cir. 1965).

#### 10.8.2.2 Form and Contents of the Notice.
Although this handbook uses the title “Complaint and Notice of Hearing,” the statutes applicable to the particular agency may refer to the charging document as a complaint, a petition, or some other title. Unless the applicable statutes require a different title, the notice document should always include the words “Notice of Hearing.”

The requirements for a notice of hearing are the same under both Article 6 and Article 10, and 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 violate a statute or rule, the verbatim language of or a citation to the statute or rule should be included in the notice.

4. A short and plain statement of the matters asserted. The agency should identify the conduct which is alleged to give rise to the violations 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, upon application, a more definite statement must be provided.

See A.R.S. §§ 41-1061(B) and -1092.05(D).

The content of the notice is extremely important. The notice frames 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. Carlson v. Ariz. State Pers. Bd., 214 Ariz. 426, 433, 153 P.2d 1055, 1062 (App. 2007). If evidence of new misconduct arises, the agency must either address it in a separate proceeding or suspend the proceedings and issue an amended notice allowing the party an opportunity to prepare a defense for the additional charge. Id. at 433, ¶ 22, 153 P.2d 1062. Pleadings before administrative agencies are liberally construed, however, and if an issue is actually litigated with reasonable notice and opportunity to cure surprise, the agency's finding on the issue will be upheld. Ethridge v. Ariz. State Bd. of Nursing, 165 Ariz. 97, 106, 796 P.2d 899, 908 (App. 1989). However, the agency must ensure that it includes allegations as to all relevant elements of the cause of action upon which it relies. For example, a health board that asserts unprofessional conduct based on negligence or gross negligence should include in the notice a statement of the standard of care applicable to the conduct and how the respondent deviated from the standard. Gaveck v. Ariz. State Bd. of Podiatry Exam’rs, 222 Ariz. 433, 437, ¶ 13, 215 P.3d 1114, 1118 (App. 2009).

10.8.3 Service of the Notice. Article 10 of the APA requires that, unless otherwise provided, every notice or decision must be served by personal delivery or certified mail, return receipt requested, or by any other method reasonable calculated to effect actual notice on the agency and every other party at the party’s last address of record with the agency. Every party is required to notify the agency of a change of address within five (5) days of the change. See A.R.S. § 41-1092.04. Although not required by the statutes, it is usually a good idea to also mail a copy of the notice to the party by regular mail.

Article 6 of the APA does not specifically identify a method of service for a Complaint and Notice of Hearing. Due process requires that the agency use a method that is reasonably calculated, under all the circumstances, to inform the interested parties that an action is pending and to afford them the opportunity to present their objections. Mullane
v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); see also Comeau v. Ariz. State Bd. of Dental Exam'rs, 196 Ariz. 102, 108, ¶ 28, 993 P.2d 1066, 1072 (App. 1999). Generally, the statutes applicable to an agency prescribe the manner of giving notice. If the agency statutes do not prescribe how the notice must be served, the notice should be given by personal delivery upon the person or sent by certified mail to the intended recipient at the last known address contained in the records of the agency. See, e.g., Bingham v. Natural Res. & Envtl. Protection Cabinet, 761 S.W. 2d 627, 628 (Ky. App. 1988) (constructive service by certified mail to last known address is adequate.) Again, although not required by the statutes, it is usually a good idea to also mail a copy of the notice to the party by regular mail.

Neither Article 10 nor Article 6 of the APA requires sending a copy of the notice to a third party, e.g., a complainant. An agency's organic statutes or rules may, however, require service of various documents upon a complainant. See, e.g., A.R.S. § 32-1263.02(E) (Dental Board).

10.8.4 Timing of Service - Notice of Hearing. Article 10 specifies that the Notice of Hearing be served at least thirty (30) days prior to the date set for the hearing. A.R.S. § 41-1092.05(D).

In Article 6 cases, unless a specific statute applicable to the agency provides otherwise, “the notice [must] be given to the party at least twenty (20) days prior to the date set for hearing.” A.R.S. § 41-1061(A).

10.8.5 Response to the Complaint and Notice. Although some agencies’ organic statutes address the issue, neither Article 6 nor Article 10 of the APA addresses how a party is to respond in a contested case. All that the APA requires is an opportunity to respond. See A.R.S. §§ 41-1061(C) and -1092.07(D).

Generally, the parties may respond by filing an answer to the notice, and indeed may be required to do so by a statute or rule in an agency's organic law. 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. Article 10 also notes that a matter can be disposed of informally if a party “defaults,” which is a failure to respond and defend. See A.R.S. § 41-1092.07(F)(5). Generally, a “default” should only be declared if an agency's statutes clearly require an answer within a specific time or if the agency's statutes specifically declare that the failure to respond will have the effect of deeming all allegations admitted without the collection of evidence. See, e.g., A.R.S. § 32-1664(I) (Nursing Board deems allegations in complaint admitted if no response is filed within 30 days after service of the notice of hearing); A.R.S. § 32-1155(B) (same for Registrar of Contractors). Also, depending upon the applicable statutes, failure to file an answer to the notice may carry other important procedural consequences, such as limiting the party's right to introduce evidence. See, e.g., A.R.S. § 32-1855(G) (requiring answer if physician respondent wishes to be present at hearing before Osteopathic Board).
The time for filing an answer may be prescribed by statute or rule. However, a party may file a motion requesting an extension of time, stating the reasons for the request. The agency or presiding officer may, in its discretion, grant the extension upon a showing of good cause, for example, when the respondent has been ill or has been unable to obtain legal counsel.

10.9 Hearing Procedures Generally Applicable to Administrative Adjudications.

10.9.1 Initiating the Process. Although similar, there are some differences in the way contested cases and appealable agency actions are initiated. The initiation procedures for appealable agency actions are discussed fully at Section 10.7. The initiation procedures for contested cases are discussed fully at Section 10.8.

10.9.2 Deciding When the Hearing Must Be Held - Time Requirements for Hearings.

10.9.2.1 Time to Hold Hearing for Appealable Agency Action. Under Article 10, an agency must hold a hearing on an appealable agency action within sixty (60) days after the notice of appeal is filed with the agency. A.R.S. § 41-1092.05(A)(1). The agency must comply with the 60-day deadline regardless of whether it conducts the hearing itself or refers the case to OAH. Although this phrase has not been interpreted in a published decision, this statute should be interpreted to require the hearing to start within sixty (60) days. The hearing may then continue on subsequent days if necessary. Also, the time for a hearing can be advanced or delayed on the agreement of the parties or for good cause. A.R.S. § 41-1092.05(C).

If a self-supporting regulatory board (see A.R.S. § 41-1092(7)) that meets quarterly or less frequently receives a notice of appeal for an appealable agency action, it must hold the hearing at the next meeting of the board after the notice of hearing is issued, unless the notice is issued within thirty (30) days before the board meeting. A.R.S. § 41-1092.05(B). In such cases, the hearing will be held at the following meeting. Id. If good cause is shown, a hearing may be held at a later meeting of the board. A.R.S. § 41-1092.05(B)(2).

10.9.2.2 Time to Hold Hearing for Contested Case. Article 10 does not directly address the time in which an agency must hold a hearing on a contested case when it determines that a hearing is necessary and that it will conduct the hearing itself. The agency must provide thirty days notice of the hearing to all parties and provide the information required for a notice of hearing. A.R.S. § 41-1092.05(D). When an agency discovers information indicating that it must take action in the form of a contested case (such as an action to discipline a license or revoke a permit), it should act promptly to conduct the hearing to ensure the safety of the public. The organic statutes of some agencies may impose separate requirements to commence an administrative hearing. See
A.R.S. § 32-1451(R) (requiring the Medical Board to commence a formal hearing within 120 days after completing notice of complaint and hearing).

If a self-supporting regulatory board (see A.R.S. § 41-1092(7)) that meets quarterly or less frequently chooses to hold its own hearing in a contested case, it must hold the hearing at the next meeting of the agency after the Notice of Hearing is issued, unless the notice is issued within thirty (30) days before the meeting, in which case the hearing will be held at the following meeting. A.R.S. § 41-1092.05(B). If good cause is shown, the time for a hearing may be extended to a later meeting. A.R.S. § 41-1092.05(B)(2).

If a contested case is referred to OAH for the hearing, OAH is required to hold the hearing within sixty (60) days of the agency's request for a hearing. A.R.S. § 41-1092.05(A)(2). The hearing may be advanced or delayed by agreement of the parties, or for good cause. A.R.S. § 41-1092.05(C). Notwithstanding the requirements of A.R.S. § 41-1092.05(A), the Legislature may also modify the deadline for an agency to commence a hearing. See 2010 Ariz. Sess. Laws, 7th Spec. Sess., ch. 4 § 6 (lifting sixty-day requirement for OAH to hold hearings during fiscal year 2010-2011).

10.9.2.3 Accelerating a Hearing in Article 10 Cases. As already noted, the time requirements for a hearing can generally be advanced or delayed by the agreement of the parties or for good cause. A.R.S. § 41-1092.05(C). Additionally, Article 10 provides that a hearing “shall be expedited” in two circumstances: (1) where provided by law, and (2) upon a showing of extraordinary circumstances or the possibility of irreparable harm. A.R.S. § 41-1092.05(E). A hearing can be expedited, however, only if the parties to the administrative adjudication have actual notice of the hearing date. Id.

AHCCCS may file a motion requesting an expedited hearing within thirty (30) days in every member grievance and eligibility appeal that cites federal law. Id.

10.9.3 Use of OAH Administrative Law Judges or Hearing Officers.

10.9.3.1 General Information - Deciding Who Will Conduct the Hearing. Under both Article 6 and Article 10 of the APA, one of the first decisions that the administrative decision maker must make is whether to assign the administrative adjudication to an administrative judge for the collection of evidence and a recommended decision or whether to conduct the hearing itself. This decision should be made by the agency's decision maker at the same time that the decision is made to initiate formal proceedings, or in the case of an appealable agency action, as soon as practicable after receiving the notice of appeal.

The purpose of referring a case to an administrative law judge or hearing officer is to satisfy due process by allowing for a full trial-like hearing. Use of an administrative law judge or hearing officer allows one person to preside over the receipt of evidence, listen to testimony, and review exhibits. The judge then reports his or her findings and conclusions
to the decision maker. The document prepared is advisory only, as the ultimate decision must be made by the public body or State officer who has the duty to decide the controversy.

10.9.3.2 Article 10 - Use of OAH. Article 10 of the APA contemplates that an agency can either conduct its own hearings or use an administrative law judge (ALJ) employed by OAH. See A.R.S. §§ 41-1092.01(F), -1092.02(B) and (D). Article 10 of the APA allows an agency to conduct its own hearings if, and only if, the agency head, board, or commission responsible for making the final decision directly conducts the hearing itself. A.R.S. § 41-1092.01(F). If an agency is subject to Article 10, and chooses not to conduct its own hearing, it must use an ALJ employed by OAH. A.R.S. § 41-1092.02(B). The agency generally cannot appoint its own hearing officer to conduct the hearing. When requesting a hearing from OAH, specific information must be supplied, including: (1) the caption of the matter, including the names of parties; (2) the agency matter number; (3) identification of the matter as a contested case or appealable agency action; (4) if the case involves an appealable agency action, the date of the notice of appeal; (5) the estimated time for hearing; (6) the proposed hearing dates; (7) any request to expedite or consolidate; and (8) any agreement of the parties to waive applicable time limits to set the hearing. A.A.C. R2-19-103(A). OAH has a form for providing this information. Id.

10.9.3.3 Article 6 - Use of Hearing Officers. Article 6 of the APA does not specifically discuss the use of a hearing officer to assist an agency in conducting an administrative adjudication, but the practice has been used by agencies for years. See, e.g., Walker v. De Concini, 86 Ariz. 143, 151, 341 P.2d 933, 939 (1959). If authorized by statute or regulation, the agency may appoint a hearing officer, also sometimes referred to as a “hearing examiner” or “administrative law judge,” to conduct the hearing. The delegation should be accomplished in writing, delineating clearly the scope of the delegation; copies of the delegating document should be made available 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. 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 actions and recommendations. Walker, 86 Ariz. at 151-53, 341 P.2d at 939-40.

The decision maker for the Article 6 agency is responsible for deciding whether to use a hearing officer and, if so, determining the hearing officer's responsibilities. The use of a hearing officer is extremely helpful when the subject matter of the proceeding is technical or complex. Agencies that regularly employ hearing officers should adopt rules delineating the authority of the hearing officer.

10.9.3.4 Duties of the Administrative Law Judge or Hearing Officer. The duties of the individual appointed to preside over an administrative adjudication are basically the same for the OAH administrative law judge under Article 10 and the hearing officer under Article 6. The first and primary duty of the administrative law judge or hearing officer is to
preside over the hearing. The presiding official is responsible for ensuring that the hearing is orderly, fair, and expeditious. He or she generally decides all procedural motions or requests. Dispositive motions, on the other hand, should be addressed directly to the decision maker.

The administrative law judge or hearing officer is required to prepare Findings of Fact and Conclusions of Law which she or he recommends to the decision maker. See Section 10.10.2.

10.9.4 Impartiality of the Presiding Official or Decision Maker - Procedures to Protect.

10.9.4.1 Disqualification of the Presiding Official or Board Member. An administrative law judge, hearing officer, or decision maker should be disqualified whenever bias or prejudice would make that person unable to conduct a fair and impartial hearing or when a statutory conflict of interest prevents participation.

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. However, bias, prejudice, and prejudgment on issues of law or policy are not reasons for disqualification unless it is shown that the “mind of the decision maker is ‘irrevocably closed’ on the particular issues being decided.” Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc., 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990). See also the discussion of combining administrative, investigative, and prosecutorial functions in Section 10.15. A presiding official is presumed to be fair and can be disqualified only upon a showing of actual bias. Martin v. Superior Court, 135 Ariz. 258, 260, 660 P.2d 859, 861 (1983).

If the presiding official or decision maker (e.g., a board member) has a financial or other property interest in the outcome of the proceeding that creates a conflict of interest under A.R.S. § 38-503 or any other statute, the individual cannot participate in the proceeding and should take whatever action is required by law. See Chapter 8.

10.9.4.2 Procedures for Disqualification. If a presiding official or decision maker determines that he or she is unable to conduct a hearing in an impartial manner or that he or she has a conflict of interest, he or she should promptly disqualify himself or herself from any participation in the matter. If any question arises about the existence of impartiality or a conflict, the matter should be disclosed to the parties.

A party to a proceeding may file a motion with the agency alleging that the hearing officer or a decision maker is unable to conduct the hearing because of bias or other disqualification and requesting that the decision maker or hearing officer recuse himself from the hearing. Article 10 of the APA specifically allows such a motion in any contested case or appealable agency action heard by OAH for reasons of bias, prejudice, personal
interest, or lack of technical expertise necessary for a hearing. A.R.S. § 41-1092.07(A). The motion should state the grounds for disqualification as precisely as possible. The motion should be filed before the hearing begins or at the first opportunity after the party becomes aware of the facts upon which the claim of disqualification is based. Some agencies may have adopted their own rules prescribing procedures for deciding a motion to disqualify and prescribing the contents of such a motion and the circumstances under which it will be granted.

If a presiding official cannot conduct the hearing due to disqualification, the reasons for removal should be made part of the record and all parties should be informed of the disqualification. The hearing then resumes with a new presiding official, unless he or she determines that continuation will result in substantial prejudice to the rights of the parties. In that event, a new hearing should be scheduled or the case dismissed without prejudice to the right of the agency to initiate a new proceeding.

If disqualification of one member of a board or other multi-member entity is requested, and the member refuses to recuse himself, the full membership should decide whether disqualification is appropriate, without the member in question participating in that decision. If the board decides that disqualification is appropriate, the disqualified member should not participate in the hearing.

10.9.4.3 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. 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 the member is disqualified. See Croaff v. Evans, 130 Ariz. 353, 358-59, 636 P.2d 131, 136-37 (App. 1981).

For example, if four members of a seven member board are required for a quorum and are present at a board meeting to discuss several matters, the board could not discuss a particular matter in which one of the four members has been disqualified, because for purposes of discussing or deciding that matter, the necessary quorum of four members is not present. If 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. 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, 89 P.2d 136, 140 (Cal. App. 1939).
10.9.4.4  **Ex Parte Communications.**  *Ex parte* communications are communications between one party to a proceeding, or his or her representative, and the hearing officer, the decision maker, or any member of a board conducting the hearing in the absence of other parties. Generally speaking, neither the hearing officer or any member of the decision making body 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. OAH’s rules expressly prohibit *ex parte* communications with its ALJ’s. A.A.C. R2-19-105. If the agency engages in such communications, its final decision may be reversed on appeal. *W. Gillette, Inc. v. Ariz. Corp. Comm’n*, 121 Ariz. 541, 542, 592 P.2d 375, 376 (App. 1979). All agencies that conduct administrative adjudications should adopt a procedural rule concerning *ex parte* communications explaining the prohibition and providing sanctions for those who violate the prohibition. A model rule on *ex parte* communications is provided in Appendix 10.3, and all agencies are encouraged to use this rule as a guide in adopting their regulations.

10.9.5 Pre-Hearing Conferences and Stipulations.

10.9.5.1  **Pre-Hearing Conferences.** Article 10 of the APA specifically provides for pre-hearing conferences, which may be held to: (1) clarify or limit procedural, legal, or factual issues; (2) consider amendments to any pleadings; (3) identify and exchange lists of witnesses and exhibits; (4) obtain stipulations or rulings regarding testimony, exhibits, facts, or law; (5) schedule deadlines, hearing dates, and locations; and (6) allow the parties an opportunity to discuss settlement. See A.R.S. § 41-1092.05(F). OAH’s rule for pre-hearing conferences is at A.A.C. R2-19-112.

Although Article 6 of the APA does not provide for pre-hearing conferences, the presiding officer has discretion to call such a hearing to facilitate the proceeding.

If a pre-hearing conference is 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.

*Caveat:* Decision makers who will make the ultimate decision if formal proceedings are instituted should be careful not to become directly involved in informal conferences and proceedings. A decision maker who has been too closely involved in negotiating a potential settlement as part of an informal conference may not be able to act impartially in a formal hearing. 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. See Sections 12.4.1 - 12.4.2 for a more detailed discussion of informal disposition of charges.

10.9.5.2  **Stipulations.** The parties may stipulate to undisputed issues or facts. See A.R.S. § 41-1092.05(F)(4). Stipulated facts are not required to be proved at the hearing. Stipulations may also be used to extend time or to change procedures at the
hearing. A stipulation should be in writing or stated upon the record. An agency should not honor a stipulation in which all parties did not participate. A stipulation is never binding on a non-consenting party.

10.9.6 Discovery. Discovery is the disclosure to the opposing side, prior to the hearing, of facts, documents, or other things that are within the knowledge or possession of a party. 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 adjudication. Although the Arizona Civil and Criminal Rules of Procedure provide for discovery, those rules do not apply in administrative adjudications, and both Article 6 and Article 10 of the APA provide very limited authority for discovery in administrative adjudications. Therefore, although some agencies are specifically authorized by statute or rule to permit discovery in their administrative adjudications, the APA affords no general “right” parties to engage in discovery in administrative hearings.

Article 6 of the APA authorizes only two pre-hearing discovery procedures, depositions and subpoenas. A.R.S. § 41-1062(A)(4). Depositions are testimony taken under oath and outside the presence of the hearing officer or members of the board and transcribed by a court reporter. Subpoenas are orders to produce documents or to appear for testimony. “Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has reasonable need of the deposition testimony or materials being sought.” Id. The presiding officer should designate the manner and the terms under which depositions are taken or the documents produced. Under Article 6, the presiding officer may also order pre-hearing depositions for use as evidence at the hearing if a witness “cannot be subpoenaed or is unable to attend the hearing.” Id.

Article 10 of the APA does not provide for discovery depositions, and mentions only the allowance of subpoenas for the production of documents if the party seeking the discovery demonstrates that the party has reasonable need of the materials being sought. A.R.S. § 41-1092.07(F)(4). Article 10 allows depositions for use as evidence only when a witness cannot be subpoenaed or is unable to attend the hearing. Id. Article 10 specifically states that no other means of discovery will be allowed. Id.

Arizona has a public records law that mandates the availability for inspection and copying all non-confidential records of a state agency. See generally A.R.S. § 39-121; Chapter 6. Many parties to administrative adjudications use this law to gain access to documents related to their case.

In addition, agencies that regulate health professionals have separate disclosure requirements when they seek to hold a disciplinary interview or hearing. A.R.S. § 32-3206. The statute lists a number of such agencies that regulate health professionals, including the Arizona Medical Board, the Arizona Nursing Board, and the Arizona Board of Behavioral Health Examiners. A.R.S. § 32-3201(2). At least ten days before the disciplinary interview or hearing (if the agency does not hold an interview), the agency must
notify the health professional of the information available for disclosure, and upon the request of the professional or his attorney, must disclose the information listed in the section. A.R.S. § 32-3206(A). This information includes the following:

1. Any review conducted by an expert or consultant providing an evaluation of or opinion on the allegations.

2. Any records on the patient obtained by the board from other health care providers.

3. The results of any evaluations or tests of the health professional conducted at the board's direction.

4. Any other factual information that the board will use in making its determination.

A.R.S. § 32-3206(A). The health professional or his attorney may not disclose the information received to any other person or use it in any proceeding other than the disciplinary interview or hearing, and subsequent appeals thereof. A.R.S. § 32-3206(B). The failure to abide by these restrictions constitutes unprofessional conduct. Id. The agency may charge the health professional or his attorney “for the cost of providing the information received up to the fee for making a copy of each page as prescribed by section 12-284, subsection A.” A.R.S. § 32-3206(C).

10.9.6.1 Disclosure of Witnesses and Exhibits. Neither Article 6 nor Article 10 of the APA contemplates the pre-hearing disclosure of witnesses and exhibits, although that may be part of the discussion at a pre-hearing conference in an Article 10 case. See A.R.S. § 41-1092.05(F)(3). Nevertheless, agencies may require by rule or order that each party disclose to the other parties the witnesses and exhibits that the party intends to use at the hearing. See, e.g., A.A.C. R12-5-2304(A) (Land Department Board of Appeals). In some cases, failure to make the required disclosures results in the exclusion of undisclosed evidence subsequently offered at the administrative hearing. A.A.C. R12-5-2304(B). In addition, as explained above, various statutes may impose separate disclosure requirements on agencies in different circumstances. A.R.S. § 32-3206.

10.9.6.2 Disclosure of Investigative Materials. Even if a party attempts to gain access to materials under the public records law, the organic statutes for many agencies provide for the confidentiality of materials obtained during the investigation of their licensees. See, e.g., A.R.S. § 32-1451.01(C). This type of law is designed to protect the confidentiality of patient names, medical records, and other such privileged matters from being open to public inspection merely because a state agency collects them. This type of confidentiality statute may also prevent the disclosure of investigative materials pursuant to a public records request by a respondent in an administrative adjudication.
10.9.7 Motions. A motion is simply a request by a party that the presiding officer or an agency’s decision maker take a particular action. The APA does not specifically provide for requests by motion, but this is the generally accepted mode of making formal requests. OAH has adopted a rule defining the requirements for motions filed with it. A.A.C. R2-19-106.

10.9.7.1 Use of Motions. Motions should be made in writing or stated on the record so that a written record can be maintained of all such requests. All motions must be made at the appropriate time and in accordance with any procedural requirements applicable to the proceeding. OAH specifies a number of rulings for which motions are appropriate at A.A.C. Although not exhaustive, R2-19-106(A) lists the types of motions that may be filed. Motions in an OAH case must be filed at least fifteen (15) days prior to the hearing unless the moving party can demonstrate good cause, as defined in the rule, for a later filing. A.A.C. R2-19-106(C).

10.9.7.2 Responses to Motions. Any party may, within applicable time limits, respond to a motion made by another. A response may support the motion or oppose it. Time limits for responses are set by statute, rule, or, if not mentioned otherwise, by order of the presiding officer. OAH requires that responses be filed within five (5) days of service of the motion, or as otherwise directed by the administrative law judge. A.A.C. R2-19-106(D).

10.9.7.3 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. A motion may be a simple one, such as extending the period of time in which to file a pleading. These motions are usually granted without argument if they are made in a timely manner. On the other hand, a motion may be complex and require the determination of contested issues, and may even be dispositive of the case, and oral argument may be permitted. However, an administrative law judge at OAH does not have authority to grant or deny a dispositive motion. See § 10.9.7.4. Presentation of evidence, usually in written form, may be appropriate in considering some 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 argument and the presentation of evidence concerning circumstances surrounding the rule’s adoption.

OAH rules provide that a party may request oral argument, but discretion to allow such argument lies with the administrative law judge. A.A.C. R2-19-106(E).

10.9.7.4 Disposition of Motions. Unless a statute or rule provides otherwise, the presiding officer may rule on all procedural, discovery, and evidentiary motions. Rulings should be made as promptly as possible and should be committed to writing or stated in the record so that the record is clear.
Dispositive motions, such as motions to dismiss the proceedings, must be ruled upon only by the ultimate decision maker. In the case of matters referred to OAH for hearing, this means that the administrative law judge can only recommend to the agency whether to dismiss the case. In cases where a pre-hearing motion to dismiss has been filed, the administrative law judge should conduct the hearing and rule on the motion as part of the recommended decision for the agency, rather than ruling on the motion without conducting the hearing.

10.9.8 Subpoenas.

10.9.8.1 Types of Subpoenas. Two types of subpoenas 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 the person has control, and, if necessary, to testify.

10.9.8.2 Subpoena Authority. The presiding officer of an administrative adjudication has the authority to issue subpoenas compelling the attendance of witnesses and the production of documents and other evidence. A.R.S. §§ 41-1062(A)(4), -1092.07(C). In addition, specific statutes applicable to an agency may authorize the issuance of subpoenas.

10.9.8.3 Application for Issuance of a Subpoena. Generally, any party to an administrative adjudication may request that the appropriate presiding officer issue a subpoena. The party requesting issuance of a subpoena is usually responsible for preparing the subpoena, obtaining the necessary signature, and effecting service. See, e.g., A.A.C. R4-1-117(D).

The rules adopted by OAH, which apply to any subpoena requested from an administrative law judge in an Article 10 case, set specific requirements for subpoena requests. See A.A.C. R2-19-113. OAH also has a form for parties to utilize. See Appendix 10.4. The application should identify the caption and docket number of the case, the name and address of the witness to be subpoenaed, if any; the documents, if any, sought together with the name and address of the custodian of records for the documents; the time and place of the hearing or deposition at which the witness is expected to appear; and the name, address and telephone number of the party or the attorney of the party making the request. See A.A.C. R2-19-113(A). The administrative law judge or decision maker may require that the person seeking a subpoena include a short statement of the relevance of the information sought and why they have reasonable need for such information. A.A.C. R2-19-113(B).
10.9.8.4 Objections To and Enforcement of the Subpoena. OAH's rules, applicable to Article 10 cases, allow a party served with a subpoena to object within five (5) days of service, or at the beginning of the hearing, if less than five days exists. A.A.C. R2-19-113(D). The administrative law judge may quash or modify the subpoena if it is unreasonable or oppressive, or if the requested testimony or evidence can be procured by other means. A.A.C. R2-19-113(E). In addition, the administrative law judge or decision maker may quash the subpoena if the information requested is not relevant or if the requesting party fails to establish reasonable need for such information. *Id.*

If a witness fails to comply with a subpoena, the agency or a party may apply to the superior court for an order compelling the person to comply. A.R.S. §§ 12-2212(B), 41-1062(A)(4), -1092.07(C). Before seeking such an order, an agency should weigh both the importance of the testimony or material sought and the delay that would result from petitioning the court to enforce the subpoena.

10.9.9 Conducting the Hearing.

10.9.9.1 The Presiding Officer. Depending on the agency's statutes and rules, the presiding officer can either be an OAH administrative law judge, a hearing officer, a board member (usually the chairperson), or the agency head. The presiding officer should ensure that the hearing proceeds smoothly and that all parties are treated fairly. The presiding officer usually has the power, pursuant to statute, rule, or written delegation, to perform many tasks, including:

1. Regulating the discovery process in those cases in which discovery is permitted,

2. Holding conferences to simplify or settle issues,

3. Issuing subpoenas,

4. Placing witnesses under oath,

5. Taking action necessary to maintain order in the hearing,

6. Ruling on procedural questions arising during the hearing,

7. Ruling on evidentiary issues and controlling the introduction of evidence,

8. Calling recesses or adjourning the hearing,

9. Prescribing and enforcing general rules of conduct and decorum during the hearing,
10. Examining witnesses,

11. Appointing a clerk to perform ministerial tasks such as mailing exhibits and maintaining the record.

10.9.9.2 Hearing Officers and Decision Makers -- Standards of Conduct. The individual(s) who will be hearing evidence, whether members of a board or a hearing officer, should not discuss the case with a party or the party's attorney unless in the presence of all parties or their representatives. See Section 10.9.4.4 (ex parte communications). For example, decision makers may wish to visit the scene of property involved in an adjudication proceeding. When the decision maker is a multimember public body, such a visit must conform to the requirements of the Open Meeting Law, see generally Chapter 7, and be properly noticed so that all interested parties have an opportunity to attend. Any substantive discussion of the case that occurs at the scene should be held in the presence of all parties or their representatives and recorded. Additionally, decision makers should not discuss the substance of the case with any person other than, in the context of a properly noticed hearing, the parties, fellow members of the decision making body, and, for purposes of requesting procedural and evidentiary advice, the legal counsel assigned to provide them with independent advice. Decision makers should also refrain from conducting independent research into legal or factual issues presented by the case. In the event that a decision maker believes additional information is necessary, he should request that the parties address the information either orally or in a written brief so that the information is on the record and all parties may respond.

Decision makers should prepare in advance by reading the complaint and notice of hearing, the answer, if any has been filed, and any other pleadings, motions, or briefs relating to the proceeding. They should plan to attend all the sessions necessary to conclude a hearing on a case. Decision makers should avoid any appearance of prejudice for or against any party, attorney, or witness, especially when questioning a witness.

10.9.9.3 Party Standards of Conduct. To ensure a fair and efficient hearing, the presiding officer must enforce standards of proper conduct on the part of persons present. The officer should recognize the person entitled to speak and refuse to allow any person to speak who has not been recognized. If a disturbance arises, the presiding officer should ask the offending person to be quiet or leave the hearing room. If necessary, and after appropriate warning, the hearing officer may rule that a person has forfeited his right to participate in the hearing and may order a person removed from the room. OAH has promulgated a rule to govern disruptions occurring at a hearing. A.A.C. R2-19-120.

10.9.9.4 Application of Open Meeting Law. Arizona's Open Meeting Law requires that agencies consisting of a multimember board allow the public to attend their administrative adjudications. See Chapter 7. To the extent practicable, hearing officers and agency heads should conduct all other aspects of the proceeding, such as argument or hearings on motions, in an open proceeding and on the record. The Open Meeting Law
allows for testimony to be taken in executive session in some circumstances. See A.R.S. § 38-431.03(A)(2) (executive session for records and information confidential by law). It also requires that discussions and decisions concerning the case among a majority of the board members must take place in an open meeting. See A.R.S. § 38-431.01. For more information on the Open Meeting Law and its application to “quasi-judicial” proceedings, see Chapter 7.

10.9.9.5 Maintaining a “Record” of the Proceeding. Generally, the presentation of all oral arguments and oral testimony must be stenographically or mechanically recorded. A.R.S. §§ 41-1061(F), -1092.07(E). A tape recorder, digital recorder, video recorder or other recording device may be used to record the hearing instead of a court reporter or stenographer. A.R.S. § 38-424. Agencies using recording devices rather than a court reporter should ensure that the original recording is preserved for future reference and that any transcript of the recording is accurate. 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. Video recording also eliminates most of these problems.

Hearings conducted at OAH are digitally recorded, and any party requiring a transcript of the proceedings must pay to have the recording transcribed. A.R.S. § 41-1092.07(E). Alternatively, the agency can pay to have a court reporter present at the OAH hearing and to have the court reporter's transcript prepared.

Documentary evidence offered or admitted in evidence should be carefully marked and should remain in the custody of the presiding officer or a duly appointed clerk.

For cases adjudicated under Article 6, A.R.S. § 41-1061(E) provides that the “record” of an administrative adjudication shall include:

1. All pleadings, motions, and interlocutory rulings. Interlocutory rulings are rulings by the agency that do not finally dispose of the matter, such as rulings on a discovery or evidentiary motion, or motions for a more definite statement.

2. Evidence received or considered.

3. A statement of matters officially noticed.

4. Objections and offers of proof and rulings thereon. The agency should include in the record documentary evidence that was offered, but the admission of which was rejected by the presiding officer. These are called “offers of proof.” Evidence that has been rejected should be included in the record but not considered in making the final decision.
5. Proposed findings of fact and exceptions.

6. Any decision, opinion or report by the officer presiding at the hearing.

7. All staff memoranda, other than privileged communications, and data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

Article 10 has no similar provision defining the exact contents of the “record,” but the agency must make and maintain a formal record of an administrative adjudication. The purpose of the record is to detail procedural matters decided at the hearing, all evidence received, and all decisions rendered with sufficient clarity so that others can use it to review the case. Schmitz v. Ariz. State Bd. of Dental Examiners, 141 Ariz. 37, 40-41, 684 P.2d 918, 921-22 (App. 1984). If OAH is used to conduct a hearing, the agency may request that OAH transmit to the agency the “record” of its proceedings as described in A.R.S. § 12-904. A.R.S. § 41-1092.08(A). That section defines the “record” to include:

1. The original agency action from which review is sought.

2. Any motions, memoranda or other documents submitted by the parties to the appeal.

3. Any exhibits admitted as evidence at the administrative hearing.

4. The decision by the administrative law judge and any revisions or modifications to the decision.

5. A copy of the transcript of the administrative hearing, if the party seeking judicial review desires a transcript to be included in the record and provides for preparation of the transcript at the party's own expense. Any other party may have a transcript included in the record by filing a notice with the office of administrative hearings or the agency that conducted the hearing within ten days after receiving notice of the complaint and providing for preparation of the transcript at the party's own expense.”

A.R.S. § 12-904(B). An agency conducting its own hearing under Article 10 can also use this definition as a guideline in maintaining the record of its own administrative hearings.

10.9.9.6 Interpreters. The presiding officer must appoint a qualified interpreter when notified that one is needed because the principal party in the proceeding or a witness...
is deaf or substantially hearing impaired. A.R.S. § 12-242(B). A qualified interpreter is “a person who has a valid license of competency authorized by the commission for the deaf and the hard of hearing.” Id. § (H)(2). “If the interpreter or the deaf person determines that effective communication is not occurring the court or appointing authority shall permit the interpreter or the deaf person to nominate a qualified intermediary interpreter to provide interpreting services between the deaf person and the appointed interpreter during proceedings.” Id. § (F). For further discussion of required accommodation of disabled persons under the Americans with Disabilities Act, see Sections 15.25 - 15.25.5.

The presiding officer may, in his or her discretion, appoint an interpreter when, for example, 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 (a) is able to readily communicate with the person using the interpreter and (b) is able to accurately repeat and translate the statements of the party or witness.

10.9.9.7 Order of Proceedings. In Article 10 cases, the order of proceedings is governed by A.A.C. R2-19-116, which provides very specific guidance. Article 6 has no similar guidelines, but the OAH rules provide a useful guideline for any administrative adjudication.

10.9.9.7.1 Convening the Hearing. The presiding officer calls the session to order and identifies the case by name and number, if any. A.A.C. R2-19-116(B). The officer may also state for the record the general subject of the hearing and cite the statutory authority for holding the hearing. The presiding officer should ask the parties and their counsel to identify themselves.

Initially, all parties should be given the opportunity to state any objections not already in the record concerning the prehearing proceedings and to make and receive rulings on any remaining motions.

10.9.9.7.2 Deciding Whether to Exclude Non-party Witnesses. A party may request that all non-party witnesses be excluded from the hearing room so that they cannot hear the testimony of others. A.A.C. R2-19-118. The decision maker should require the witnesses to leave the hearing room and admonish them not to talk to each other about their testimony while waiting to be called to the stand.

10.9.9.7.3 Stipulations. OAH’s rules call for the administrative law judge to enter into the record any stipulations, settlements, agreements, or consent orders entered into by the parties before or during the hearing. A.A.C. R2-19-116(C).

10.9.9.7.4 Opening Statements. The party with the burden of proof may make an opening statement. A.A.C. R2-19-116(D). The remaining parties may also make opening statements in the order determined by the presiding officer. In the opening statement,
each party summarizes their case and identifies what they intend to prove. Although the party may refer to facts, the presentation itself is not evidence. When a party is not represented by counsel, she may attempt to testify at this point in the proceeding. The decision maker should remind her that this is a summary and that she will be able to provide a more lengthy account during her testimony. If the self-represented party makes all of her factual assertions during the opening statement, the decision maker should ask her to confirm the truth of these statements after she has been sworn as a witness.

10.9.9.7.5 Order of the Presentation of Evidence. The order for the presentation of evidence, in OAH rules at A.A.C. R2-19-116(E), is as follows:

1. The party with the burden of proof normally presents evidence first. The parties can agree to change this order, or the administrative law judge may change the order if allowing another party to proceed first would be more expeditious or appropriate and would not create prejudice.

2. The party who goes first should introduce their exhibits and question witnesses on direct examination. Again, the administrative law judge can change the order and manner of questioning to expedite and ensure a fair hearing. Upon the request of a party, the decision maker can allow a witness to testify by making a statement rather than requiring the question and answer format for direct examination. An individual party (i.e. a licensee or applicant) without a lawyer generally testifies on her own behalf in this fashion.

3. At the conclusion of the examination of each witness, the other party has the right to cross-examine the witness. The other party can ask questions regarding the testimony given, the credibility of the witness, or any matter relevant to the case. The cross examining party may use leading questions during the examination. Leading questions are questions that suggest the answer. Re-direct examination, after cross-examination, may be permitted. During re-direct examination, the party calling the witness may ask further questions to clarify matters raised during cross examination. But she may not ask questions about new factual matters for the first time.

4. Although OAH's rules do not expressly provide for it, it is common for the presiding official (including all members of a multi-member body), to question the witnesses after the parties have completed their questioning. Any question from the decision maker should be phrased to elicit facts that are relevant to the case, and should not state an opinion about the facts. The decision maker should only express opinions later during the deliberation of the case and after all witnesses have testified. If the decision maker asks questions of a witness, the decision maker should allow each party to ask any follow-up questions they may have, starting with the party that called the witness.
5. When the party with the burden of proof finishes calling all of its witnesses, it rests its case. The other party then presents evidence in the manner described in paragraphs 2-4.

6. Although OAH's rules do not expressly provide for it, the party with the burden of proof is normally given the opportunity to present rebuttal evidence in the form of witness testimony or documentary evidence. Rebuttal evidence should be limited to matters raised during the opposing party’s presentation of evidence. The party with the burden of proof should not raise new factual issues during its rebuttal case that are not related to the evidence provided by the other party.

7. All parties may make closing arguments. The party with the burden of proof should go first. After the other party(ies) have presented closing arguments, the party with the burden of proof may make a rebuttal closing argument. OAH's rules give the administrative law judge discretion on the order for closing arguments. A.A.C. R2-19-116(G). The administrative law judge may require that closing arguments be supplemented by written memoranda. Id.

8. Conclusion of the hearing. OAH's rules specify that a hearing ends when all evidence is submitted, final arguments are concluded, or when any post-hearing memoranda are submitted, whichever occurs last. A.A.C. R2-19-116(H).

10.9.9.8 Evidence. Evidence generally consists of testimony, documents, and other tangible items presented by the parties during the hearing that establish the facts necessary to reach a decision in the case. The agency is not obligated to adhere to the technical rules of evidence that govern court proceedings. A.R.S. §§ 41-1062(A)(1), -1092.07(F)(1). The APA specifically recognizes that the failure to adhere to the rules of evidence required in judicial proceedings shall not be grounds for reversal. Id. The evidence supporting a decision must only be “substantial, reliable and probative.” Id. This low standard of admissibility favors the receipt of any relevant evidence. However, this leniency is not boundless, and Article 6 of the APA provides that “[i]relevant, immaterial or unduly repetitious evidence shall be excluded.” A.R.S. § 41-1062(A)(1). Article 10 of the APA allows an administrative law judge to “exclude evidence if “its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” A.R.S. § 41-1092.07(D).

10.9.9.8.1 Forms of Evidence. Evidence may be in many forms, including the following:

1. Oral testimony by a witness at the hearing;
2. Recorded or transcribed oral statements previously given by a witness;
3. Physical evidence such as “the gun” or a piece of mechanical equipment;
4. Documentary evidence, i.e., written or printed materials including public, business, or institutional records;
5. Illustrative evidence, such as charts or graphs;
6. Documents containing facts the parties have agreed may be treated as true;
7. Books, treatises, or articles that contain facts that have been officially noticed by the decision making body;
8. Audio or video recordings of relevant events or locations; and

10.9.9.8.2 Oaths and Affirmations. As a general rule, all testimony should be given under oath. An oath impresses upon the witness the seriousness of the occasion and is intended to ensure that his testimony will be truthful. If the witness objects to “swearing” or “taking an oath,” he may simply “affirm” the truthfulness of the testimony. If a witness’s testimony is interrupted by a recess, the oath need not be re-administered when the hearing reconvenes. The presiding officer, however, should remind the witness that he is still under oath.

10.9.9.8.2.1 Use of Depositions as Evidence. On application of a party, a presiding officer may order a deposition of a witness for use at the hearing as evidence. A.R.S. §§ 41-1062(A)(4), -1092.07(F)(4). This form of substitute testimony is only appropriate when the witness cannot be subpoenaed or is unable to attend the hearing. Id.

10.9.9.8.3 Objections to Evidence. A party to the proceedings should inform the presiding officer if she objects to the admission of evidence. If a party fails to make a timely objection, the decision maker may consider the evidence even if it would normally be inadmissible. Tabora v. State, 150 Ariz. 262, 266, 722 P.2d 989, 993 (App. 1986) (citing Justice v. City of Casa Grande, 116 Ariz. 66, 68, 567 P.2d 1195, 1197 (App. 1977)). If the presiding officer sustains an objection, the evidence is immediately withdrawn and may not be considered in making the final decision. Conversely, if the objection is overruled, the evidence is admitted and may be considered in the decision making process. Evidence can be re-offered if the offering party can cure the objection.

10.9.9.8.4 Relevant/Probative Evidence. Relevant evidence is defined 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.” Ariz. R. Evid. 401. Article 10 of the APA says that only relevant evidence is admissible and Article 6 of the APA specifically provides that irrelevant evidence shall not be admitted in the administrative proceeding. A.R.S. §§ 41-1062(A)(1), -1092.07(D). The APA also uses the term “probative” in describing the type of evidence upon which an agency decision must rest. Id. Probative evidence is evidence that tends to prove or disprove some fact in question. Thus, if evidence in any way assists the trier of fact in resolving any fact at issue in a hearing, and is otherwise sufficiently reliable, it should be admitted. The trier of fact then must decide how much weight to give the evidence.

10.9.9.8.5 Hearsay. Hearsay is generally defined as evidence of a statement made by anyone outside the hearing, when the statement is “offered . . . to prove the truth of the matter asserted.” Ariz. R. Evid. 801(c). For example, instead of testifying about what he saw, heard, tasted, or felt with the senses, the witness testifies to what someone else wrote or said. If, to prove a construction defect, Mr. Smith testified that “Mr. Jones stated that 'the floor was wet because the rain leaked into the building,'” such a statement would be hearsay if offered to prove the wetness of the floor. However, the same statement may be admissible to show Mr. Jones’s knowledge of the condition of the floor. In that context, the statement is not being offered to prove the truth of the matter asserted, but to prove Mr. Jones’s knowledge. Hearsay evidence is generally considered less reliable than eyewitness testimony because the person who made the original statement was not under oath, and the opposing party at the hearing does not have the opportunity to cross examine the person. The evidentiary weight of such a statement may depend upon whether the declarant is believable, and because he or she is not physically present, the decision maker cannot observe demeanor or judge credibility as effectively.

Despite these deficiencies, “[i]t is clear in Arizona that hearsay is admissible in administrative proceedings, and that it may, in proper circumstances, be given probative weight.” Begay v. Ariz. Dept. of Econ. Sec., 128 Ariz. 407, 409, 626 P.2d 137, 139 (App. 1981). In Wieseler v. Prins, 167 Ariz. 223, 226-27, 805 P.2d 1044, 1047-48 (App. 1990), a police officer testified at an administrative adjudication that a second police officer had told him that the respondent had been driving a vehicle. The second police officer had received the information from a third officer who saw the respondent at an accident scene. Id. at 227, 805 P.2d at 1048. The court held that this “triple-hearsay” was admissible, stating the general rule that “[r]eliable hearsay is admissible in administrative proceedings and may even be the only support for an administrative decision.” Id. at 227, 805 P.2d at 1048. The court described what evidence may be deemed reliable:

“Hearsay evidence is considered reliable where the circumstances tend to establish that the evidence offered is trustworthy.” In Begay, the court, quoting Reynolds, said that hearsay could be relied upon by the hearing officer if it is of the type that “reasonable men are accustomed to rely [on] in serious affairs.” Generally, hearsay is unreliable when:
[T]he speaker is not identified, when no foundation for the speaker’s knowledge is given, or when the place, date and time, and identity of others present is unknown or not disclosed.

Id. *(citations omitted).* Because the officer identified the original speaker, was able to lay a foundation for the basis of the speaker’s knowledge, and the petitioner failed to present evidence that the testimony was untrustworthy or unreliable, the court found that the testimony was admissible and probative. *Id.*

Thus, as long as evidence is reliable and relevant, it should be admitted even though it may be hearsay. The trier of fact must decide what weight to give the evidence.

10.9.9.8.6 Rules of Privilege. The presiding officer should not usually permit or compel the discovery or introduction of privileged evidence. Generally, privileged evidence includes communications between client and attorney (A.R.S. § 12-2234); physician and patient (A.R.S. § 12-2235); husband and wife (A.R.S. §§ 12-2231 -2232); penitent and clergyman (A.R.S. § 12-2233); or informant and journalist (A.R.S. § 12-2237). Other specific privileges found in statute and case law may also apply to preclude the discovery or admission of evidence. See, e.g., *City of Tucson v. Superior Court*, 167 Ariz. 513, 517, 809 P.2d 428, 432 (1991).

10.9.9.8.6.1 The Fifth Amendment Privilege. On occasion, a witness may invoke the Fifth Amendment privilege against self-incrimination. Inasmuch as the agency’s decision must be based on evidence presented in the case, a party refusing to testify by invoking the Fifth Amendment privilege may be viewed as having presented no evidence on his behalf. This failure to testify may, from an evidentiary standpoint, weigh against him. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-19 (1976); see also *U.S. v. Stein*, 233 F.3d 6, 15 (1st Cir. 2000) (“[T]he Supreme Court has adhered to the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions from their refusal to testify in response to probative evidence offered against them.”).

However, the agency cannot automatically infer guilt from a refusal to testify based on the Fifth Amendment privilege because “[t]he Supreme Court has repeatedly held that it violates the Fifth Amendment for public officials to discipline a person solely because of his or her refusal to answer questions in a non-criminal setting.” *Butler v. Oak Creek- Franklin Sch. Dist.*, 172 F.Supp.2d 1102, 1126 (E.D. Wis. 2001). The person’s refusal to testify merely constitutes another piece of evidence considered by the agency in reaching a factual determination. “Thus, if a decision-maker has independent evidence that someone has engaged in misconduct, the decision-maker may constitutionally consider the person’s silence as additional supporting evidence.” *Id.* Where there is other evidence of the person’s misconduct, the person’s refusal to testify and rebut the evidence introduced against him can be an additional factor pointing towards a finding of guilt. See *id.*
See Section 12.3.4 for discussion of compulsory testimony and the privilege against self-incrimination; see also A.R.S. §§ 41-1066, and -1092.10.

If testimony is critical to a case, it is possible to compel a witness who has invoked the Fifth Amendment privilege to testify, after receiving written approval of the Attorney General. A.R.S. §§ 41-1066(B), and -1092.10(B). Testimony obtained in this way is generally not admissible in any criminal prosecution. Because compelling testimony can interfere with criminal prosecutions, an order to compel should not be requested without careful consideration.

10.9.9.8.7 Exclusion of Evidence. If evidence does not meet the standards of relevancy identified in the previous sections, or is unduly repetitive or unreliable, the presiding officer may exclude it. A.R.S. § 41-1092.07(D); A.A.C. R2-19-116(F) (administrative law judge shall make rulings necessary to prevent argumentative, repetitive, or irrelevant questioning and to expedite the examination). An order excluding evidence should be stated clearly on the record.

10.9.9.8.8 Exhibits. The presiding officer should require that all documentary and physical evidence be marked for identification and that a list be kept describing the exhibits and identification numbers. The list should also note whether each exhibit was admitted as evidence. During or prior to the hearing, the offering party should furnish every other party one copy of any document offered as evidence. The original exhibit should be given to the presiding officer. Copies of documents may be received in evidence in lieu of originals at the discretion of the presiding officer. However, if a party challenges the authenticity of the copy, the party is entitled to compare the copy with the original. A.R.S. §§ 41-1062(A)(2), -1092.07(F)(2).

10.9.9.8.9 Notice of Judicially Cognizable Facts and Technical and Scientific Facts. The decision maker may consider, in addition to other evidence, (1) judicially cognizable facts and (2) “generally recognized technical or scientific facts within the agency's specialized knowledge.” A.R.S. §§ 41-1062(A)(3), -1092.07(F)(3).

A judicially cognizable fact is one that is not subject to reasonable dispute because it is either generally known 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 that are published by the American Institute of Certified Public Accountants are within the specialized knowledge of the Arizona Accountancy Board and can be noticed as facts in a proceeding before that board.
“Parties [to the proceeding] shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed including any staff memoranda or data . . . so that the opposing parties can be afforded an opportunity to contest the material so noticed.” Id. For example, such notice may be given by identifying the facts to be noticed in the “Complaint and Notice of Hearing,” in a separate document served on the parties before or during the hearing, or by an oral notice during the hearing. It is permissible, although not desirable, to ask a decision maker to notice matters after the conclusion of the hearing, provided that all parties are given a reasonable opportunity to contest the matters to be noticed.

10.9.9.8.10 Expert Testimony. A decision maker in an adjudicative proceeding is specifically authorized to use his or her experience, technical competence, and specialized knowledge in evaluating the evidence presented. A.R.S. §§ 41-1062(A)(3), -1092.07(F)(3). Thus, it is not always necessary to have an expert assist in evaluating the significance of evidence that is within the decision maker's area of expertise. Gaveck v. Ariz. State Bd. of Podiatry Exam'rs, 222 Ariz. 433, 438, ¶ 18, 215 P.3d 1114, 1119 (App. 2009) (confirming continued validity of Croft v. Board of Dental Examiners, 157 Ariz. 203, 209, 755 P.2d 1191, 1197 (App. 1988)). And, even if expert opinion is introduced, the decision maker may use his or her own expertise to disagree with the opinions given by the expert witness.

If expert testimony is admitted, the presiding officer must first determine that the person is qualified to provide the information offered and whether the expertise of the witness applies to the subject about which the witness will testify. Madison Granite Co. v. Indust. Comm'n, 138 Ariz. 573, 576, 676 P.2d 1, 4 (App. 1983). If conflicting expert evidence is received, the decision maker has the responsibility to resolve the conflict. Phelps v. Indust. Comm'n, 155 Ariz. 501, 505, 747 P.2d 1200, 1204 (1987).

10.9.9.9 Burden of Proof. As a general rule, the burden of proof rests on the party bringing the charges or making a claim. In a contested case involving the revocation or suspension of a license, the burden of proof is on the agency bringing the charges. In an appeal from an appealable agency action, such as the denial of an application for a license or an application for benefits, the burden of proof is generally on the appellant. See A.R.S. § 41-1065; § 41-1092.07(G); A.A.C. R2-19-119(B).

10.9.9.9.1 Standard of Proof - Preponderance. The APA does not specifically identify the standard of proof to be applied in administrative adjudications. Unless a different standard of proof is applicable pursuant to a statute, the standard of proof should be the same as in most civil proceedings - the preponderance of the evidence. See Culpepper v. State, 187 Ariz. 431, 437, 930 P.2d 508, 514 (App. 1996). OAH specifically recognizes this standard of proof in its rules. See A.A.C. R2-19-119(A).
The “preponderance” standard requires that the factual conclusions be based on the weight of the evidence. The fact finder must be convinced that, based on the evidence admitted, the factual finding is more likely than not what truly happened. See Hewett v. Indust. Comm’n, 72 Ariz. 203, 209, 232 P.2d 850, 854 (1951).

10.10 Making the Decision.

10.10.1 When the Board Conducts its Own Hearing. At the conclusion of the presentation of evidence and after the final closing arguments are made, the agency must make its final decision and order. If a hearing officer is not used, the decision maker must consider all of the evidence presented and determine the facts and their legal significance. For example, in a disciplinary proceeding, the decision maker must determine whether the evidence supports the charges brought against the respondent. In making these determinations, it may be helpful for the decision maker to obtain from each party their proposed findings of fact and conclusions of law, including specific record references that support each finding proposed.

10.10.1.1 Findings of Fact and Conclusions of Law. The APA requires that “[a]ny final decision shall include findings of facts and conclusions of law, separately stated.” A.R.S. §§ 41-1063, -1092.07(F)(7). Further, the “[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” Id. The findings of fact must be based exclusively on the evidence submitted at the hearing and any facts officially noticed. A.R.S. §§ 41-1061(G), -1092.07(F)(6). The agency's findings “must be explicit to make it possible for the [reviewing] court to make an intelligent review and to determine whether the facts as found provide a reasonable basis for the decision.” Hatfield v. Indust. Comm’n, 89 Ariz. 285, 288, 361 P.2d 544, 547 (1961).

The procedures for decision making vary with each agency. As a general rule, when a hearing officer is not used, only those decision makers who were present during the entire hearing should participate in the decision. 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 reviewed all the evidence.

Some agencies may require a separate vote for the findings of fact, the conclusions of law, and the sanctions. Some may vote on all three together. Regardless of how the vote is taken, the vote on the final decision 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 body be taken in an open meeting for which proper notice has been given. See A.R.S. § 38-431(4) (defining “meeting”).
10.10.2 When the Board Receives a Hearing Officer’s Recommended Decision.

10.10.2.1 Proceedings under Article 6. If a hearing officer conducts the formal hearing, he or she should submit to the agency a document titled “Recommended Findings of Fact, Conclusions of Law and Decision.” Because it is the ultimate decision maker, the agency is not bound by the recommended findings of fact and conclusions of law provided by the hearing officer, including findings related to the credibility of witnesses. Ritland v. Ariz. State Bd. of Medical Exam’rs, 213 Ariz. 187, 191, ¶ 12, 140 P.3d 970, 974 (App. 2006). Thus, the decision maker has the option of modifying or even completely rejecting the hearing officer's findings of fact and conclusions of law if its reading of the record differs from that of the hearing officer. Any deviations from the hearing officer's findings of fact and conclusions of law can only be made if the decision maker has reviewed all pertinent portions of the record. Id., at ¶ 14 (citing Stoffel v. Ariz. Dept. of Econ. Sec., 162 Ariz. 449, 451, 784 P.2d 275, 277 (App. 1990)). The decision maker should state, in the decision, the basis for the deviation. However, because the hearing officer is the person who actually sees the witnesses and hears the evidence, the recommended findings of fact should be given respectful consideration and in appropriate circumstances, some reliance. Thus, the hearing officer's findings of fact are often adopted by the final decision maker.

Similarly, because the hearing officer “observes the demeanor and attitude of the witnesses” when making determinations about the credibility of the witnesses, her findings should be given “greater weight than other findings of fact more objectively discernible from the record.” Ritland, 213 Ariz. at 191, ¶ 13, 140 P.3d at 974. “Thus, while the [agency] should give deference to the ALJ’s credibility findings, it may overrule those findings only if it finds evidence in the record for so doing.” Id. at ¶ 14. The agency’s decision must state its factual support in the record for rejecting the credibility determinations. Id.

10.10.2.2 Proceedings under Article 10.

10.10.2.2.1 Time Limit for ALJ Decision. If OAH is used, the administrative law judge must issue a written decision within twenty (20) days after the hearing is concluded. A.R.S. § 41-1092.08(A). See A.A.C. R2-19-116(H) for definition of hearing “conclusion.” If OAH is not used, there is no time within which the final written decision must be issued.

10.10.2.2.2 Time Limit to Review ALJ Decision. When OAH is used, Article 10 of the APA contains specific time requirements that a board or agency must follow in deciding whether to accept, reject, or modify the administrative law judge’s recommended order. The time limits depend on when the recommended decision is sent, who makes the final decision (an agency head or a board), and if the final decision maker is a board, how often the board meets. If the time limits are not met, the administrative law judge’s recommended decision becomes the final administrative decision. See A.R.S. § 41-1092.08(D) and (F).
10.10.2.2.1 Final Decision by Agency Head. If the final decision maker for an administrative adjudication is an agency head, the agency head must render his or her decision within thirty (30) days after OAH sends the recommended decision or the administrative law judge’s recommended decision becomes the final recommended decision. A.R.S. § 41-1092.08(B).

10.10.2.2.2 Final Decision by Board that Meets Monthly or Less Frequently. If the final decision maker is a board or commission that meets monthly or less frequently, and the recommended decision is sent at least thirty (30) days before the next meeting of the board or commission, the decision must be made at that meeting of the board. A.R.S. § 41-1092.08(D). Conversely, if a recommended decision is sent within thirty (30) days of the next meeting of the board or commission, the decision should be made at the following meeting. See A.R.S. § 41-1092.05(B)(1).

10.10.2.2.3 Date OAH “Sends” Recommended Decision. In deciding when a decision must be made, a recommended decision from an OAH administrative law judge is deemed to be “sent” on personal delivery or five (5) days after the decision is mailed to the agency, executive director, board, or commission. A.R.S. § 41-1092.08(E).

10.10.2.2.4 Time for Delivery of Final Decision to OAH. Once a final decision is made, the final decision maker must ensure that OAH receives a copy of the decision no later than five (5) days after the deadline for decision (i.e., the date of the meeting at which the decision must be made). A.R.S. § 42-1092.08(B) and (D). If the fifth day is a Saturday, or if after hours filing is necessary, it is sufficient to fax a copy of the document to OAH. If the final decision is not so filed, the recommended order of the administrative law judge will be certified as the final decision in the case. Id., see also A.R.S. § 41-1092.08(F)(1).

10.10.2.3 Argument by Parties Prior to Final Decision on ALJ Recommendations. While it may be helpful in some cases, it is not necessary for an agency to hear oral argument from the parties in considering the ALJ’s recommended decision. Neither due process nor Arizona’s Administrative Procedure Act requires that an agency hear argument on the ALJ’s recommendation prior to the final decision. Similarly, there is no case law in Arizona addressing whether due process may require the agency to allow the parties to file written exceptions to the ALJ’s recommended decision. However, due process arguably does not require such argument because the parties have received all the process due them in the hearing before the ALJ. Devitis v. New Jersey Racing Comm’n, 495 A.2d 457, 466 (N.J. Super. Ct. App. Div. 1985). Thus, although it would be most prudent to at least allow written comments by the parties, there is some support for the position that a final decision maker retains full discretion on the process it will use when it meets to discuss and decide how to treat the ALJ’s recommendations.
10.10.2.4 Deciding Final Findings of Fact and Conclusions of Law.

10.10.2.4.1 Option One: Affirm/Accept/Decline to Review the Decision. The first option under the APA is for a decision maker to accept the hearing officer's decision without change. To do this, the decision maker need not review the transcripts or the exhibits, but can simply accept the ALJ's recommended decision. A.R.S. § 41-1092.08(B). This can be done by taking a formal vote to accept the decision as the decision maker's own, or by simply voting not to review the decision. Either option has the effect of allowing the ALJ's decision to control the outcome of the case.

10.10.2.4.2 Option Two: Reject/Modify All or Part of the ALJ's Recommended Decision. The decision maker has the option to accept portions of the ALJ's recommended decision and to reject or modify other portions. This option is a bit more complicated and the proper procedure depends on the types of changes involved.

10.10.2.4.2.1 Changes to Factual Findings. If the decision maker decides to reject or modify a finding of fact, each decision maker (i.e., every voting member of a Board) must have read the pertinent portions of the factual record presented at the formal hearing, including the transcript and the exhibits. See Ritland, 213 Ariz. at 191, ¶ 14, 140 P.3d at 974; Stoffel v. Dept' of Econ. Sec., 162 Ariz at 451-52, 784 P.2d at 277-78 (App. 1989); Fla. Power & Light Co. v. State, 693 So.2d 1025, 1027 (Fla. App. 1997). To change a finding of fact, the APA requires the decision maker to specify the change and explain in writing the justification for the rejection or modification. A.R.S. § 41-1092.08(B). In addition, when modifying or rejecting findings of fact related to credibility issues, greater weight should be given to the ALJ's findings of fact than that given to other findings and the agency must identify a factual basis in the record for deviating from the ALJ's findings. Ritland, 213 Ariz. at 191, ¶ 13, 140 P.3d at 974

10.10.2.4.2.2 Changes to Conclusions of Law. The decision maker need not review the record to make changes to the Conclusions of Law, as long as they are truly legal conclusions and not factual findings in disguise. However, the decision maker must still provide written justification for the rejection or modification of the recommended Conclusion of Law. A.R.S. § 41-1092.08(B).

10.10.3 Determining Sanctions. Once the agency has completed its fact finding function, if it has concluded that a violation of one or more rules or statutes has been demonstrated, it must determine what sanction or other action is appropriate. The sanctions available to the agency are determined by its organic statutes and must be based on the findings of fact and conclusions of law adopted by the agency. Examples of sanctions are explained more fully in Chapter 12, Enforcement, and include revocation or suspension of a license; refusal to renew a license; censure; probation; restitution to damaged parties; fines; or the issuance of a cease and desist order. The agency may not impose a sanction greater than is permitted by the applicable statutes. See Caldwell v. Ariz. State Bd. of Dental Exam'rs, 137 Ariz. 396, 399, 670 P.2d 1220, 1223 (App. 1983). In
addition, if the agency receives a recommended sanction from the ALJ under Article 10 of the APA, it must provide written justification for deviating from the recommendation. A.R.S. § 41-1092.08(B).

10.10.4 Effect of Quorum Requirements on Decision Making. 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. See Section 10.9.4.3 for a discussion of the effects of the disqualification of a board or commission member on the quorum requirement.

10.10.4.1 Failure to Obtain a Majority Vote. 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. 

10.10.4.2 Effect of a Tie Vote. As a general rule, where the members of the administrative tribunal are evenly divided on a particular question, the result is that no action can be taken by the agency. See Siegel v. Ariz. State Liquor Bd., 167 Ariz. 400, 402, 807 P.2d 1136, 1138 (App. 1991) (holding that, where the agency's statutes required the concurrence of a majority of a quorum of the Board to take an action, the Board's tie vote was not a final decision and "remanded to the Board for a final decision in which a majority of a quorum . . . concurs in the resolution of [the] appeal.").

The provisions of an agency's statutes and rules may cause a different result, particularly regarding the allocation of the burden of persuasion. In one case, the Arizona Supreme Court held that a tie vote of the Tucson Civil Service Commission on a police officer's appeal of his discharge was not sufficient to uphold the officer's discharge because, according to the Tucson city charter, the discharging officer had the burden of showing just cause for the termination. Wicks v. City of Tucson, 112 Ariz. 487, 488, 543 P.2d 1116, 1117 (1975). In two other cases, the Arizona Court of Appeals held that a tie vote of the Industrial Commission had the effect of denying claimants' petitions where, under the particular wording of the Commission's statutes, the burden was on the petitioners to secure a majority vote. Scowden v. Indust. Comm'n, 115 Ariz. 81, 84, 563 P.2d 336, 339 (App. 1977); Rabago v. Indust. Comm'n, 132 Ariz. 79, 80 n. 1, 643 P.2d 1049, 1050 n. 1 (App. 1982).
10.10.5 Informal Disposition of Claims. Article 10 specifically provides that informal disposition of a case may be made by stipulation, agreed settlement, consent order, or default. A.R.S. § 41-1092.07(F)(5).

10.11 Form of the Decision. Article 6 of the APA states that the final decision must be either stated in the record or in a written document. A.R.S. § 41-1063.

Article 10 of the APA requires that all decisions be memorialized in a final written document. See A.R.S. § 41-1092.08. The written decision should contain a caption identifying the agency before whom the proceeding took place, the title of the proceeding, the parties, and the agency case number for the proceeding. The decision should also include 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 decision maker or, in the case of a multi-member body, the presiding officer should sign the document.

10.11.1 Changes to OAH Administrative Law Judge's Recommended Decision. If a decision maker has modified the recommended order of an OAH administrative law judge, the decision maker must attach a copy of the administrative law judge's decision to the final decision, identify the modifications to the recommended decision, and provide a written justification indicating the reasons for the modification. A.R.S. § 41-1092.08(B). The decision maker may also attach a copy of its own order, incorporating the modified recommendation from the administrative law judge, to a cover letter specifying the modifications and the basis for each modification.

10.11.2 Providing Notice of Rehearing Requirement for Judicial Review. As explained in Section 10.14.2.2, generally a party is not required to request a rehearing by the agency before seeking judicial review. For some agencies, however, a request for rehearing is required. See Id. Article 10 requires that in such cases the final decision provide notice of that requirement. A.R.S. § 41-1092.09(B). In such situations, the following language is suggested at the end of the order, immediately preceding the signature line:

Notice of Rehearing or Review Requirements: Notice is hereby given that this decision is subject to rehearing or review as set forth in A.R.S. § 41-1092.09, and that failure to file a motion for rehearing or review within thirty days after service of the decision has the effect of prohibiting the party from seeking judicial review of the board's decision.

10.12 Effectiveness of the Decision.

10.12.1 Article 6 Cases. Except when good cause exists, a decision is not final and therefore not effective until the time for requesting a rehearing before the agency
expires; or, if a rehearing is requested, when the agency's decision on the rehearing request has been rendered. A.R.S. § 41-1062(B); see also A.R.S. § 12-901(2). Some agencies have enacted a rule that allows for the immediate effectiveness of an order if the decision maker finds that the public health, safety, or welfare requires that the order be immediately effective and that a rehearing would be unnecessary or contrary to the public interest. See A.A.C. R17-1-512(J) (Department of Transportation).

10.12.2 Article 10 Cases. The statutes governing rehearing and review in Article 10 cases do not specify when a decision becomes effective. However, A.R.S. § 12-901(2) provides that decisions in administrative adjudications are not “final” for purposes of administrative review in superior court until after a request for rehearing or review is denied, or the decision on a request for rehearing or review is rendered. Many agencies that use Article 10 have also enacted a rule that allows for the immediate effectiveness of an order when the public health, safety, or welfare so requires and when a rehearing would be impracticable or contrary to the public interest. See A.A.C. R4-16-103(B) (Arizona Medical Board).

10.13 Service of the Decision. Article 6 of the APA provides that, “[u]nless otherwise provided by law, parties shall be notified either personally or by mail to their last known address of any decision or order.” A.R.S. § 41-1063.

Article 10 of the APA says that service of a decision is complete on personal service, or five (5) days after the date that the decision is mailed to the parties' last known address. A.R.S. § 41-1092.09(C). Under A.R.S. § 41-1092.04, “every . . . decision under this article shall be served by personal delivery or certified mail, return receipt requested, or by any other method reasonably calculated to effect actual notice on the agency and every other party to the action to the party's last address of record with the agency.” Failure to notify a party of the decision may prevent its effectiveness and may prevent the rehearing or appeal time from running. For more detailed discussion, consult Volume 3 of the Arizona Appellate Handbook.

10.14 Reconsideration of Decision.

10.14.1 Article 6 Procedures. Article 6 of the APA provides that all State agencies must adopt a rule allowing all parties to apply for a rehearing or review of the agency decision before the decision becomes final. A.R.S. § 41-1062(B). The only time an agency need not provide an opportunity for rehearing is if "good cause exists otherwise.” Id. The rehearing shall be governed by a rule drafted as closely as practicable to Rule 59 of the Arizona Rules of Civil Procedure. See id. Because rule 59 of the Arizona Rules of Civil Procedures allows a motion to be filed within fifteen (15) days after a decision, a rule that requires a motion for rehearing to be filed in less than fifteen days is invalid. Dioguardi v. Superior Court, 184 Ariz. 414, 418, 909 P.2d 481, 485 (App. 1995). The rule should also include grounds for rehearing substantially similar to those listed in Rule 59:
1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise which could not have been prevented by ordinary prudence.

4. Material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial.

5. Excessive or insufficient damages.

6. Error in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions re-quested, or other errors of law occurring at the trial or during the progress of the action.

7. That the verdict is the result of passion or prejudice.

8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

Where an agency permits rehearing or other administrative review, that procedure must be followed or an appeal to the Superior Court may be precluded. For more detailed discussion of this principle, consult Volume 3 of the Arizona Appellate Handbook.

10.14.2 Article 10 Procedures.

10.14.2.1 Time to File Request for Rehearing or Review. In cases governed by Article 10, a party has thirty (30) days after service of a final decision to file a motion for rehearing or review. A.R.S. § 42-1092.09(A)(1). This time limit governs despite the existence of another statute or rule that provides for a shorter time limit. See A.R.S. § 41-1092.02(B) and (D). The time for filing the motion is absolute. Stapert v. Ariz. State Bd. Of Psychologist Exam’rs, 210 Ariz. 177, 179, ¶ 8, 108 P.3d 956, 957 (2005) (holding that party’s failure to “scrupulously” follow administrative remedies deprives the superior court of jurisdiction).

The opposing party then has fifteen (15) days to respond after the motion for rehearing is filed. A.R.S. § 42-1092.09(A)(2).

10.14.2.2 Necessity of Request for Rehearing or Review to Preserve Right to Seek Judicial Review. Generally, a party need not seek rehearing or review to exhaust administrative remedies. A.R.S. § 41-1092.09(A)(3). However, a party to an administrative
adjudication before a “self-supporting regulatory board” must file a petition for rehearing or review in order to be eligible to seek judicial review. See A.R.S. § 41-1092.09(B). Failure to timely file a motion for rehearing or review bars a party from judicial review. Stapert, 210 Ariz. at 179, ¶ 8, 108 P.3d at 957. The boards that are considered to be “self-supporting regulatory boards” are listed in A.R.S. § 41-1092(7). Furthermore, if a motion for rehearing or review is required prior to judicial review, the board must notify the parties of this requirement in its final decision. See A.R.S. § 41-1092.09(B); see also Section 10.11.2.

10.14.2.3 Time for Ruling on Rehearing Motion. A ruling on a motion for rehearing or review must occur within fifteen (15) days after the response to the motion is filed, or if none is filed, within five (5) days after the response was due. A.R.S. § 41-1092.09(D). A self-supporting regulatory board must rule on the motion within fifteen (15) days after the response is filed or at the board’s next meeting after the motion is received, whichever is later. Id. The agency may rule on the motion for rehearing or review at a later date if the parties agree to the extension of time.

10.14.3 Ability of the Agency Prosecutor to Request Rehearing or Review of an Agency Decision in a Disciplinary or Enforcement Matter. In most cases involving discipline or enforcement, the case is brought in the name of the agency that eventually makes the final decision on what sanctions, if any, to apply. In these cases, an Assistant Attorney General will “prosecute” the case, and the agency will reach its decision based upon the record as submitted by both the prosecution and the respondent. In some cases, the question arises whether the prosecution can request a rehearing or review of the agency’s decision. The answer is yes. Section 41-1092.09, A.R.S., provides that any “party” may file a motion for rehearing or review. One of the parties to any administrative adjudication is the prosecution, which should have an equal ability to challenge a board decision by seeking rehearing or review. See A.R.S. § 41-1001(13) (defining the term “party”).

10.15 Combining Administrative, Investigative, and Prosecutorial Functions with Adjudicatory Functions. Challenges sometimes have been raised to a single agency investigating, prosecuting, and adjudicating charges against persons regulated by the agency. In Withrow v. Larkin, 421 U.S. 35, 46-55 (1975), the United States Supreme Court held that, absent a showing of special circumstances, combining such functions in the same agency is not unconstitutional. See also Comeau v. Ariz. State Bd. of Dental Exam’rs, 196 Ariz. 102, 108, ¶ 26, 993 P.2d 1066, 1072 (App. 1999); Croft v. Ariz. State Bd. of Dental Exam’rs, 157 Ariz. 203, 210, 755 P.2d 1191, 1198 (App. 1988); In re Davis, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981); In re Johnston, 663 P.2d 457, 464 (Wash. 1983).

An agency head, a board, or a commission may make an initial decision that later becomes an issue in an administrative hearing. Making the original decision, without more, does not preclude the agency head, board, or commission from adjudicating the matter, particularly if the agency head, board, or commission is the only person or entity authorized by statute to make the final decision. Additionally, agency administrators who have
previously announced a position regarding the law or public policy are not disqualified from adjudicating a matter concerning that law or policy, so long as the decision maker's mind is not “irrevocably closed” on the issues being decided. Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990).

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. Normally, the investigation can be accomplished by the agency's staff. Once the investigation is completed, the decision maker may decide, or participate in deciding, whether the results of the investigation warrant a formal hearing.

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, 135 Ariz. 258, 261, 660 P.2d 859, 862 (1983) (upholding the Department of Transportation's practice of permitting a hearing officer to question witnesses regarding the State's case when no prosecutor is present).

3. Do not permit the hearing officer or decision maker to engage in ex parte discussions concerning the merits of the case.

4. Where resources permit, use an independent hearing officer to conduct the hearing and make recommendations to the decision maker. In addition, ensure that the hearing officer's recommendations are made part of the record.

**10.16 Dual Functions of the Attorney General.** In administrative adjudications, an Assistant Attorney General assigned to represent the agency generally is responsible for presenting relevant evidence to a hearing officer or the members of the board or commission. Because the Assistant Attorney General presenting the case is an advocate in that matter, he or she cannot “advise” the decision maker on legal matters that arise. See Section 1.9.4.1. All presentations made by the Assistant Attorney General presenting the case should be considered as the argument of an adversary, and not as neutral legal advice, and should only occur in open hearing.

In complex and sensitive matters, the Solicitor General may assign an Assistant Attorney General not involved in the prosecution of the case to give the decision maker assistance in resolving certain legal questions. See Section 1.9.4.3. This advice will be limited to procedural questions and evidentiary matters. See Section 1.9.4.7. This
Assistant Attorney General will not advise the decision maker on what decisions it should make in factual or legal disputes regarding the merits of the case.  See id.

10.17 Judicial Review.  Nearly all final decisions entered in administrative adjudications 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.  Because the agency is the fact finder and hears the evidence and observes the demeanor of the witnesses, a reviewing court will give substantial weight to the determinations of fact made by the agency.  Siegel v. Ariz. State Liquor Bd., 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991).  A reviewing court will also give deference to the determination of what disciplinary 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.  See Bear v. Nicholls, 142 Ariz. 560, 563, 691 P.2d 326, 329 (App. 1984).  On the other hand, the reviewing court is not bound by an agency's determinations of law.  Eshelman v. Blubaum, 114 Ariz. 376, 378, 560 P.2d 1283, 1285 (App. 1977).  The court will, however, 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).

A detailed discussion of the procedures applicable to appeals from administrative tribunals is beyond the scope of this Chapter.  Additional information should be obtained from legal counsel and Volume 3 of the Arizona Appellate Handbook.

10.18 Recovery of Costs and Fees and Related to Administrative Adjudications.  A hearing officer or administrative law judge is authorized to award fees and costs to any "prevailing party" in an administrative adjudication.  A.R.S. § 41-1007(A).  A “party” is defined, for purposes of this statute, to include only individuals, partnerships, corporations, associations, and public or private organizations.  A.R.S. § 41-1007(H)(2).  A party is considered to be a “prevailing” party only if the agency's position was not substantially justified and the person prevails as to the most significant issue or set of issues, unless the reason for the success is an intervening change in the law.  A.R.S. § 41-1007(A).  The statute does not define what "substantially justified" means, but case law indicates that the standard is one of good faith, as when a genuine dispute exists or reasonable people could differ on the issue.  See Pierce v. Underwood, 487 U.S. 552, 565 (1988).  The award may be denied if the party seeking fees unduly and unreasonably protracted the final resolution of the case.  A.R.S. § 41-1007(B).

The party seeking an award must request it within thirty (30) days of the final decision and submit (1) evidence of eligibility for the award, (2) the amount sought, and (3) an itemized statement of attorney's fees, showing the actual time spent representing the party and the rate charged.  A.R.S. § 41-1007(C).
A decision on the award of fees is subject to judicial review. A court that reviews the decision can award fees and costs incurred during the proceedings before the hearing officer or administrative law judge. A.R.S. § 41-1007(E).
Appendix 10.1

Sample Letter to Nonmember Attorney or Representative

[Date]

[Representative's name and address]

Dear [Representative's name]:

Representatives who are not members of the State Bar of Arizona must file a Request for Permission to Represent Party before [agency's decision making body] with [agency's clerk or executive director] within [insert number] days before they wish to represent a party or parties before the [agency's decision making body].

Representatives filing the request must consent to the jurisdiction of the [agency's decision making body] and the Arizona Supreme Court for any alleged misconduct in the matter in which they are permitted to participate. Representatives agree to follow the agency tribunal's rules. It is further agreed that any failure of the representative to do so will be attributed to the represented party.

Failure to provide complete information or to timely file the request may result in denial of permission to represent a party before the [agency's decision making body]. The Request must include the following:

[requesting representative] hereby requests permission to represent [parties] in the matter of [title of the matter] and states the following under penalty of perjury:

Representative's current address and telephone number;

By what courts (if any) the representative has been admitted to practice and the dates of admission and whether the representative is in good standing and currently eligible to practice in those courts;

The title of any administrative tribunal or court in this state, and the cause therein (if any), in which the applicant has filed a request to appear as representative in this state in the preceding two years, the date of each request, and whether or not it was granted;

Whether the representative is currently suspended, censured, or disbarred by any court or tribunal.

[Exec. Dir., Clerk or Chairman]
Appendix 10.2

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

[Date]

[Name]
[Last known address of record of applicant]

Re: Notice of Appealable Agency Action
(Subject matter)

Dear ____________:

The purpose of this letter is to officially notify you that at its meeting on _____, 2001, the Board voted to deny your ___________________. The Board denied you _______ for the following reasons: [insert reasons, with references to statutes or rules on which denial is based].

You are also advised pursuant to A.R.S. § 41-1092.03 that this denial constitutes an appealable agency action subject to a hearing pursuant to A.R.S. § 41-1092, et seq. You are entitled to have a hearing before an administrative law judge or the Board on the denial of your certification application by filing a written request for a hearing/notice of appeal within thirty (30) days after receipt of this letter. The request for hearing/notice of appeal shall identify the party, the party's address, the agency, the action being appealed, and a concise statement of the reasons for the appeal. At the hearing you shall be the moving party and have the burden of proof. Additionally, pursuant to A.R.S. § 41-1092.06, you are hereby notified that you have the right to request an informal settlement conference by filing such a request with the Board in writing no less than twenty (20) days before the hearing.

If you have any questions, or if we can be of any further assistance, please contact ____________ at (602) 542-______.

Sincerely,

____________________

cc: Assistant Attorney General
Appendix 10.3

Model Rule on *Ex parte* Communication

A. In any contested case or appeal from an appealable agency action 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 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.
Appendix 10.3

Model Rule on Ex parte Communication

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.

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 in its adjudicatory role.

2. “Ex parte communication” means an oral or written communication not on the public record and not the subject of reasonable prior notice to all parties.
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Caption: No. v.

SUBPOENA (Duces Tecum)
Under the Authority of
Arizona Revised Statutes 41-1062

TO: Name: _______________________________________________________________
Address:_______________________________________________________________

You are commanded to ATTEND a hearing in this matter at the date, time and location listed below and to remain until excused.

Date: __________________________     Time: ________________
Location: _______________________________________________________________

________________________________________________________________

You are commanded to PRODUCE documents or other tangible items for the above entitled matter, specifically:(describe items)

________________________________________________________________________
________________________________________________________________________
____________ for the hearing listed above OR (if another date other than the hearing)
then on or before____________________________, 20___ at (location):
_______________________.)

The Office of Administrative Hearings endeavors to ensure the accessibility of its hearings to all persons with disabilities. Should you need special accommodations, please contact the Office of Administrative Hearings at (602)-542-9826 at least three working days prior to the hearing.

DATED this _____ day of __________________________, 20__.

_____________________________________
Administrative Law Judge

AT THE REQUEST OF: ________________________________________________
CHAPTER 11
RULE-MAKING

Table of Contents

Section 11.1 Scope of This Chapter
11.1.1 Delegation Agreements Excluded from This Chapter

Section 11.2 Definition and Function of Rules
11.2.1 Activity Excluded from the APA’s Definition of a Rule

Section 11.3 Distinguishing a "Rule" from Other Types of Agency Policy Guidelines
11.3.1 Substantive Policy Statements and Internal Policy Documents
11.3.2 Filing and Publication of Substantive Policy Statements

Section 11.4 Authority to Adopt Rules
11.4.1 Requirement of Legislative Grant of Authority
11.4.2 Mandatory and Discretionary Rules
11.4.3 Limits on Authority

Section 11.5 Types of Rules - Frequently Addressed Subject Matters
11.5.1 Rules of Practice
11.5.2 Forms and Their Instructions
11.5.3 Rules Establishing Fees
11.5.4 Licensing Time Frames
11.5.5 Amendment or Repeal of a Prior Rule

Section 11.6 Exemptions from Rule-making Procedures
11.6.1 Section 1005 Exemptions

Revised 2011
11.6.1.1 Procedures for Publication of Rules Exempt Under Section 1005

11.6.2 Section 1057 Exemptions

11.6.2.1 Attorney General Review of Rules Exempt Under § 41-1057

Section 11.7 Regular Rule-making Procedures

11.7.1 Creating and Maintaining the Rule-making Record

11.7.2 The Rule-making Docket

11.7.2.1 Opening the Docket - - Filing the Notice of Rule-making Docket Opening

11.7.3 Developing the Rule Proposal

11.7.3.1 Formal Rule-making Advisory Committees

11.7.3.2 Drafting the Rule

11.7.3.2.1 Format Requirements

11.7.3.2.2 Codification Requirements

11.7.3.2.3 Drafting Guidelines

11.7.3.2.4 Incorporation by Reference

11.7.3.3 Crafting the Preamble

11.7.3.4 Rules Affecting Small Business and the Statement of Effect on Small Business and Economic Impact Statement

11.7.3.5 Informal and Courtesy Reviews

11.7.3.5.1 Informal Review by the Attorney General

11.7.3.5.2 Courtesy Review by GRRC

11.7.4 Filing the Notice of Proposed Rule-making

11.7.5 Early Review Petitions

Revised 2011
11.7.6 Public Comment Periods
11.7.6.1 Written Comment Period
11.7.6.2 Conduct and Record of the Oral Proceeding
11.7.6.2.1 Timing of the Oral Proceeding
11.7.6.2.2 Conducting the Oral Proceeding
11.7.7 Close of the Record
11.7.8 Modifications to the Rule After Public Comment
11.7.8.1 Effect of Substantial Changes to the Rule
11.7.8.2 Options if Substantial Changes to the Rule Occur
11.7.9 Final Document Preparation and Filing the Rule with GRRC for Approval
11.7.9.1 Compiling the Rule Package for GRRC Consideration
11.7.9.1.1 The Preamble
11.7.9.1.2 The Economic, Small Business, Consumer Impact Statement (EIS)
11.7.9.2 Submission for Approval by GRRC
11.7.9.2.1 Procedures for GRRC Approval
11.7.9.2.2 Standards for GRRC Approval
11.7.9.2.3 Procedure upon GRRC Approval
11.7.9.2.4 Procedure upon GRRC Return of Rule
11.7.10 Final Filing with the Secretary of State
11.7.11 Termination of Rule-making Prior to Final Filing

Section 11.8 Emergency Adoption of Rules
11.8.1 Standards for Emergency Rule-making

Revised 2011
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.8.2</td>
<td>Procedures for Emergency Rule-making</td>
</tr>
<tr>
<td>11.8.3</td>
<td>Effective Dates and Renewal of Emergency Rule</td>
</tr>
<tr>
<td>11.8.4</td>
<td>Attaining Permanent Status for Emergency Rule</td>
</tr>
<tr>
<td>11.8.5</td>
<td>Emergency Adoption of a Delegation Agreement</td>
</tr>
<tr>
<td>Section 11.9</td>
<td>Summary Rule-making Procedures</td>
</tr>
<tr>
<td>11.9.1</td>
<td>Effective Date of Summary Rule</td>
</tr>
<tr>
<td>Section 11.10</td>
<td>Effective Date for Rules - Generally</td>
</tr>
<tr>
<td>Section 11.11</td>
<td>Publication of Directory for Rules and Substantive Policy Statements</td>
</tr>
<tr>
<td>Section 11.12</td>
<td>Post-Rule Challenge to Economic Impact Statement</td>
</tr>
<tr>
<td>Section 11.13</td>
<td>Petition for Rule-making or a Declaration that a Practice Is a Rule</td>
</tr>
<tr>
<td>Section 11.14</td>
<td>Five-Year Review Reports</td>
</tr>
<tr>
<td>Section 11.15</td>
<td>Important Dates for Submission of Reports to GRRC</td>
</tr>
<tr>
<td>Section 11.16</td>
<td>Annual Regulatory Report</td>
</tr>
</tbody>
</table>
**CHAPTER 11**

**RULE-MAKING**

**11.1 Scope of This Chapter.** This Chapter discusses administrative rules and the procedures for making rules established by the Administrative Procedure Act (APA), A.R.S. §§ 41-1001 to -1092.12. This Chapter provides the general background necessary to guide a state agency through the rule-making process required by the APA. It is important to note, however, that the information necessary to conduct rule-making is found not only in the APA, but also in the organic statutes of the agency, the statutes and rules that govern the Secretary of State (A.R.S. §§ 41-121 through -133, 41-1011 through 1013, and A.A.C. R1-1-101 through R1-114), and the Governor’s Regulatory Review Council (GRRC) (A.R.S. §§ 41-1051 through 1057 and A.A.C. R1-6-101 through R1-6-401). A useful resource is the Arizona Rulemaking Manual, which is published by and available from the Secretary of State’s Office. The Rulemaking Manual is also available on-line at [http://www.azsos/public_services/rulemakingmanual/manual.htm](http://www.azsos/public_services/rulemakingmanual/manual.htm). The manual contains a flow chart of the rule-making process, FAQs, numerous sample forms, check lists and helpful advice relating to rule-making and rule writing. Because there are frequent changes to these sources of rule-making information, it is important that an agency makes certain it uses the most recent information when making a rule.

**11.1.1 Delegation Agreements Excluded from This Chapter.** A delegation agreement is a contract between an agency and a political subdivision that authorizes the subdivision to exercise certain powers or duties of the agency. A.R.S. § 41-1001(6). Many of the procedural requirements for delegation agreements are similar to the requirements for rule-making. However, with the exception of a few references, this Chapter does not describe those requirements in detail. If an agency wishes to create a delegation agreement, the agency should contact its assigned Assistant Attorney General.

**11.2 Definition and Function of Rules.** The APA defines a “rule” as “an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency.” The definition goes on to state that a “rule” includes “prescribing fees or the amendment or repeal of a prior rule.” A.R.S. § 41-1001(18).

Thus, the term “rule” covers a broad spectrum of policy statements, standards, guidelines, and directives that apply generally to a segment of the public in the future. *Havasu Heights Ranch & Dev. Corp. v. Land Dep’t*, 158 Ariz. 552, 559, 764 P.2d 37, 44 (App. 1988) (to be a “rule” under the APA, a statement must be one of general applicability and future effect).
The primary purpose of rule-making is to give notice to the public of the substantive or procedural requirements that an agency has established for activities falling within its statutory authority. To ensure that the public is made aware of the agency’s requirements, a state agency should create rules that establish in advance its policies, regulations, and procedures of general applicability, rather than generating policy in a piecemeal fashion through “ad hoc” determinations and adjudications. *Shelby School v. Arizona State Bd. of Educ.*, 192 Ariz. 156, 164, 962 P.2d 230, 238 (App. 1998); *Anderson v. State*, 135 Ariz. 578, 663 P.2d 570 (App. 1982).

**11.2.1 Activity Excluded from the APA’s Definition of a Rule.** Several types of policy statements are expressly excluded from the definition of “rule” for purposes of the APA. For example, A.R.S. § 41-1001(18) provides that a “rule” does not include “intraagency memoranda that are not delegation agreements.” A rule does not include matters “concerning only the internal management of an agency which do 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).

**11.3 Distinguishing a “Rule” from Other Types of Agency Policy Guidelines.**

**11.3.1 Substantive Policy Statements and Internal Policy Documents.** The APA specifically accounts for two types of policy statements apart from rules – the substantive policy statement and the internal policy document. A.R.S. § 41-1001(21).

A substantive policy statement is defined as “a written expression which informs the general public of an agency’s current approach to, or opinion of, the requirements of the federal or state constitution, federal or state statute, administrative rule or regulation, or final judgment of a court of competent jurisdiction, including, where appropriate, the agency’s current practice, procedure or method of action based upon that approach or opinion.” *Id.* Because a substantive policy statement is not a rule, it is not binding and is “advisory” only. *Id.* An example of this sort of statement might be a regulatory board’s disciplinary guidelines, designed to guide a board member in deciding what type of sanction to use for a particular type of violation.

An internal policy document is defined by the APA as a statement “which only affect[s] the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties, confidential information or rules made in accordance with [the APA].” *Id.* An example of this type of statement might be an agency’s sexual harassment policy.

An individual who believes that a substantive policy statement or an agency practice is a “rule” in disguise may seek to have the practice declared void under A.R.S. § 41-1033. This process is described fully in Section 11.13.

11-2 Revised 2011
11.3.2 Filing and Publication of Substantive Policy Statements. The APA requires an agency to identify and summarize all substantive policy statements and to file that information with the Secretary of State for publication in the register. A.R.S. § 41-1091(A). An agency’s substantive policy statement is to include a specific notice to the public. The required language of the notice is found at A.R.S. §41-1091(B). Also, each agency must maintain and update at least every year a directory summarizing the subject matter of all currently applicable rules and substantive policy statements. The agency is required to keep this directory at one location. Id. § (C). The directory, rules, substantive policy statements, and any material incorporated by reference in the directory must be open to the public for inspection at the office of the agency’s director. Id. Every year, each agency must certify to GRRC that the agency is in compliance with these requirements. Id. § (D).

11.4 Authority to Adopt Rules.

11.4.1 Requirement of Legislative Grant of Authority. In making rules, an administrative agency exercises powers that have been delegated to it by the Legislature. Consequently, an agency may make 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 a statute. Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc., 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994).

The Legislature establishes policy and enacts standards to guide the agency. The legislative standards within which the agency may act may be stated in broad and general terms. Haggard v. Indust. Comm’n, 71 Ariz. 91, 223 P.2d 915 (1950); State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971). However, a statute that grants unlimited regulatory authority to an administrative agency, without any restraints or standards to direct the agency’s action, offends the Arizona Constitution as an unlawful delegation of the Legislature’s power. State v. Marana Plantations, Inc., 75 Ariz. 111, 252 P.2d 87 (1953).

An agency must make rules when the Legislature mandates their adoption. See Section 11.4.2. The Legislature may also grant discretionary authority to an agency to make rules. Id. In either case, an agency’s rules must be consistent with the Legislature’s standards.

11.4.2 Mandatory and Discretionary Rules. Mandatory rules are those that the agency is required by statute to make. For example, an agency may be required by statute to prescribe reasonable educational and professional experiences for a licensee. See, e.g., A.R.S. § 32-3605(B)(4) (Board of Appraisal). Another example is a statute requiring an agency to establish water quality standards for all navigable waters. See A.R.S. § 49-221(A).
Discretionary rules are those that the agency may make, although it is not required to do so. A common statute providing discretionary rule-making authority is one that authorizes an agency to make "such rules as may be necessary" to carry out the purposes of the statutes pertaining to the agency. See, e.g., A.R.S. § 36-554(C)(6) (authorizing the Director of the Department of Developmental Disabilities to "make and amend rules from time to time as deemed necessary for the proper administration of programs and services. . . .").

11.4.3 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. Stoffel v. Dep't of Econ. Sec., 162 Ariz. 449, 784 P.2d 275 (App. 1989). An agency may not make a rule that deprives any person of constitutional rights. Id. An agency's actions must also comply with statutory requirements concerning the rule-making procedures.

11.5 Types of Rules - Frequently Addressed Subject Matters.

11.5.1 Rules of Practice. The APA expressly provides that each agency shall make rules that establish the nature and procedural requirements of all formal proceedings. A.R.S. § 41-1003. This law embraces a primary goal of rule-making -- to inform the public in advance of the requirements that an agency will impose in its formal proceedings. See Section 11.2. Pursuant to this law, agencies must make rules related to all of its formal proceedings, including licensing procedures, adjudicatory proceedings, and even rule-making itself, which usually involves public notice and participation.

There is some question whether an agency must make rules of procedure for administrative adjudications after the Legislature created a comprehensive set of laws that govern such proceedings for most agencies -- the Uniform Administrative Appeals Procedures Act (the UAAP). See generally Chapter 10; A.R.S. §§ 41-1092 through -1092.12. The UAAP appears to require agencies conducting administrative adjudications under the UAAP to use the rules of procedure created by the Office of Administrative Hearings (OAH), even when OAH does not conduct the formal hearing for the agency. See A.R.S. § 41-1092.02(B); Chapter 10, Section 10.4.2. (This accurately describes the mandate of the APA.) The UAAP makes clear that, when it applies to an agency's administrative adjudications, its requirements supersede all other statutes and rules unless expressly exempted. A.R.S. § 41-1092.02(D). Of course, if an agency or a particular proceeding is exempt from the UAAP, the agency must make rules of procedure to govern such proceedings so the public has advance notice of the agency's requirements. A.R.S. § 41-1003.

11.5.2 Forms and Their Instructions. The APA exempts from its application a "[f]orm whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form." A.R.S. § 41-1005(A)(8). This exemption
exists to allow flexibility for the formatting of forms. If the format of a form is made as a rule, it cannot be changed except through another rule-making proceeding. On the other hand, a rule that merely specifies the substance of a form, but not its exact format, allows an agency to change the format as necessary. Thus, an agency may, but is not required to, place a form in a rule. Regardless of whether a form is included in a rule, matters of substance cannot be added to a form if that substance has not been included in an existing rule or statute.

11.5.3 Rules Establishing Fees. The APA’s definition of “rule” specifically includes prescribing a fee. A.R.S. § 41-1001(18). A fee is defined to include any charge prescribed by an agency for an inspection or for obtaining a license. A.R.S. § 41-1001(8).

Under A.R.S. § 41-1008, an agency shall not charge or receive a fee, or make a rule establishing a fee, unless the fee for the specific activity is expressly authorized by statute or a tribal state gaming compact. An agency cannot establish a fee in a rule that is based only on a statute that generally authorizes an agency to recover its costs or accept gifts or donations. A.R.S. § 41-1008(A)(1). An agency must include the specific reference to the statute or tribal state gaming compact that authorizes a fee directly on the documents related to the collection of that fee. Id. at § (B).

In addition to defining the term “fee” narrowly in A.R.S. § 41-1001(8), the APA exempts certain fee-related matters from its rule-making requirements. For example, the APA exempts a rule that “only establishes specific prices to be charged for particular goods or services sold by the agency.” A.R.S. § 41-1005(A)(5). This exemption applies to charges such as copying or the cost of a directory for an agency. Other specific exemptions for fee setting by particular agencies are contained in A.R.S. § 41-1005(A), including certain fees prescribed by A.R.S. § 6-125 (Department of Financial Institutions); A.R.S. § 3-1086 (Cotton Research and Protection Council); A.R.S. §§ 41-2144 and -2189 (Board of Manufactured Housing); A.R.S. § 32-2067 (Board of Psychologist Examiners); A.R.S. § 32-2132 (Real Estate Department); A.R.S. § 5-111(A) (Arizona Racing Commission); A.R.S. § 41-511.05 (Arizona State Parks Board); A.R.S. § 36-3409 (Department of Health Services); and A.R.S. § 32-1527 (Naturopathic Physicians Board of Medical Examiners). Other exemptions from the APA also affect the requirement of rule-making related to fees. See Section 11.6.

Certain statutes authorize an agency to “establish fees not more than,” or to set a fee “not to exceed” a specified amount. See, e.g., A.R.S. § 32-2029 (Board of Physical Therapy); A.R.S. § 32-3027(A)(1); (Board for Private Postsecondary Education). Statutes may also include a direction to establish the fees “by formal vote” at a particular meeting of a Board. See, e.g., A.R.S. § 32-1826 (Osteopathic Board). When a statute involving an inspection or obtaining a license does not set the amount of the fee, the statute inherently gives the board discretion to set the fee up to a certain amount. In such cases, the agency should set the fee in a rule. See, e.g., A.A.C. R4-24-107 (Board of Physical Therapy);
A.A.C. R4-39-201 (Board for Private Postsecondary Education). GRRC must approve any rule-making involving a fee increase by a two-thirds vote. A.R.S. § 41-1052(E).

Of course, the language used for fee-setting by the Legislature varies from agency to agency, and exemptions to this rulemaking requirement may apply. Any agency or board that is considering whether to set or change fees involving inspections or licensing activity should seek advice from its Assistant Attorney General to determine if rule-making is required.

11.5.4 Licensing Time Frames. All agencies that issue licenses are required to have rules that establish licensing time frames. See A.R.S. §§ 41-1072 through -1079. The time frames must establish an “overall time frame” within which the agency must either grant or deny the license. Within the overall time frame, the agency must establish an “administrative completeness review time frame,” within which the agency must notify an applicant that the application for a license contains all components and information required, and a “substantive review time frame,” within which the agency must determine if the information the applicant supplies meets all the substantive requirements for the license. See A.R.S. §§ 41-1072 and -1073. Exceptions exist for licenses issued under tribal state gaming compacts, within seven days after receipt of the initial application, or by lottery method. A.R.S. § 41-1073(E).

Any agency that fails to comply with established time frames may suffer financial consequences. See A.R.S. § 41-1077. For example, if the overall time frame is not met, the agency must continue to process the application, but must refund all fees charged for reviewing and acting on the application, and shall excuse any fees not yet paid. Id. Also, the agency is required to pay a penalty to the general fund for each month after the time frame expired that the license is not granted or denied. Id.

Every year, by September 1, each agency that issues licenses must report to GRRC its compliance level with its overall time frames. A.R.S. § 41-1078.

11.5.5 Amendment or Repeal of a Prior Rule. The rule-making procedures are also used to amend or repeal a rule. A.R.S. §§ 41-1001(18), -1022(A). The only exception is summary rule-making, which involves the repeal of a rule that has been rendered obsolete or the making, amendment and repeal of rules that repeat verbatim existing statutory authority granted to the agency. See Section 11.9.

11.6 Exemptions from Rule-making Procedures. The APA applies to all agencies and proceedings not expressly exempted. A.R.S. § 41-1002. There are two statutes that provide most of the exemptions from the APA’s rule-making requirements -- A.R.S. §§ 41-1005 and 41-1057. Additional isolated exemptions are found either in the APA itself (see, e.g., A.R.S. § 41-1001(1) (exempting the legislature, the courts, and the governor from the APA)), or in laws governing a particular agency. See, e.g., A.R.S. § 16-
956 (C) (exempting the Citizens Clean Election Commission from regular rule-making procedures). Most exemptions establish other procedures for public notice and comment. See, e.g., A.R.S. § 16-956(C). If so, the alternate procedures must be followed carefully. Because many of these exemptions are very specific, it is important to study carefully not only the APA, but also an agency’s organic laws to determine whether the particular subject in question is exempt from the rule-making requirements.

11.6.1 Section 1005 Exemptions. Most exemptions from the APA’s rule-making requirements are contained in A.R.S. § 41-1005. The list of exemptions relates both to specific agencies and certain general activities. For example, the APA does not apply to a “[r]ule 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). The APA does not apply to a rule that “only establishes certain prices to be charged for particular goods and services sold by an agency,” or to a rule “concerning only the physical servicing, maintenance or care of agency owned or operated facilities or property.” Id. § (A)(5) and (6). The APA does not apply to any rule made by the State Department of Corrections, or to a “[r]ule or substantive policy statement concerning inmates or committed youths of a correctional or detention facility or patients admitted to a hospital, if made by the state department of corrections, the department of juvenile corrections, the board of executive clemency or the department of health services . . .” Id. § (A)(7). The rule-making articles of the APA do not apply to the Arizona Board of Regents or institutions under its jurisdiction. Id. § (D).

There are more than 25 exemptions created by this section of the APA, which the Legislature regularly amends. It is therefore important to review the statute before any rule-making to ensure that the subject of the proposed rule is not exempt under A.R.S. § 41-1005.

11.6.1.1 Procedures for Publication of Rules Exempt Under Section 1005. Although a rule may be exempt from the notice and comment and oversight requirements of the APA by A.R.S. § 41-1005, it still must be filed with the Secretary of State. Thus, when a rule exempt under A.R.S. § 41-1005 is adopted, the agency is required to file a copy of the rule with the Secretary of State for publication. A.R.S. § 41-1005(C). The rule should be submitted to the Secretary of State with a “Notice of Exempt Rulemaking” as required by A.A.C. R1-1-902 and R1-1-602. The rule must be submitted to the Secretary of State within 120 days of the close of the record. A.A.C. R1-1-601(B).

11.6.2 Section 1057 Exemptions. Several exemptions from the APA are found in A.R.S. § 41-1057, including:

1. An agency which is a unit of state government headed by a single elected official.
2. The corporation commission, which shall adopt substantially similar rule review procedures, including the preparation of an economic impact statement and a statement of the effect of the rule on small business.


4. The Arizona state lottery if making rules that relate only to the design, operation or prize structure of a lottery game.

11.6.2.1 Attorney General Review of Rules Exempt Under § 41-1057. The Attorney General is statutorily required to review and approve rules exempted from the regular rule-making process by A.R.S. § 41-1057. See A.R.S. § 41-1044. The rule must be submitted to the Attorney General within 120 days of the close of the record. A.A.C. R1-1-601(C). The rule package must conform to the requirements of all final rule packages in A.A.C. R1-1-602. See A.A.C. R1-1-901(B). Agencies submitting an exempt rule package for review and approval by the Attorney General should mail them directly to the Attorney General or file them with the Attorney General's administration receptionist. The package should be prepared as a “Notice of Exempt Rulemaking” as required by the Secretary of State's rules A.A.C. R1-1-902 and R1-1-602. The Attorney General must approve or disapprove non-emergency rule packages within sixty days of receipt. A.R.S. § 41-1044(D).

The Attorney General conducts an in-depth review and analysis of the rule to determine whether it is (a) within the agency's authority to make; (b) consistent with the enacted legislative standards; (c) clear, concise, understandable, and in proper form; and (d) made in compliance with appropriate procedures. A.R.S. § 41-1044(B). If the rule package is not approved, the Attorney General endorses the disapproval on the rule package, states the reasons for the disapproval, and returns the rule package to the submitting agency. Id. § (E). If the rule package is approved, the Attorney General notifies the submitting agency and files the package with the Secretary of State.

11.7 Regular Rule-making Procedures. Unless exempt from rule-making procedures, a rule is valid only if it is made in substantial compliance with the APA or other statutory procedures applicable to the agency. See A.R.S. § 41-1030; Oliver v. Land Dep't, 143 Ariz. 126, 692 P.2d 305 (App. 1984). These requirements are designed to ensure adequate public participation in the rule-making process. Precise compliance with all statutory requirements will help ensure that a rule will be approved and withstand possible court challenges.
11.7.1 Creating and Maintaining the 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. A.R.S. § 41-1029 (A). The record not only must be available to the public, but must be available if there is a judicial review of the rule-making proceeding. A.R.S. § 41-1029(C). Because the record contains virtually everything filed in connection with a rule-making proceeding, it is best to begin collecting the record when the rule-making proceeding begins. This can be done by simply starting a notebook, in which the agency places everything connected to the rule-making proceeding.

11.7.2 The Rule-making Docket. For all rules subject to the APA, an agency must “maintain a current, public rule-making docket for each pending rule-making proceeding,” which is designed to provide information about the rule-making. A.R.S. § 41-1021(A). A rule-making proceeding is pending “from the time the agency begins to consider proposing the rule . . . until any one of the following occurs:” the rule-making proceeding is terminated; one year after the publication of the notice of rule-making docket opening (if no notice of the proposed rule-making is filed); the rule becomes effective; one year after the notice of the proposed rule-making is published in the register (if the agency has not submitted the rule to GRRC for review and approval); or publication of a notice of termination. Id.

The docket must contain the twelve items listed in A.R.S. § 41-1021(B):

1. The subject matter of the proposed rule.

2. A citation to all published notices relating to the proceeding.

3. The name and address of agency personnel with whom persons may communicate regarding the rule.

4. Where written submissions on the proposed rule may be inspected.

5. The time during which written submissions may be made and the time and place where oral comments may be made.

6. Where a copy of the economic, small business and consumer impact statement and the minutes of the pertinent council meeting may be inspected.

7. The current status of the proposed rule.
8. Any known timetable for agency decisions or other action in the proceeding.

9. The date the rule was sent to the council.

10. The date of the rule's filing and publication.

11. The date the rule was approved by the council.

12. When the rule will become effective.

11.7.2.1 Opening the Docket -- Filing the Notice of Rule-making Docket Opening. Upon establishing a rule-making docket, the agency must file a "Notice of Rulemaking Docket Opening" with the Secretary of State for publication in the register. A.R.S. § 41-1021(C). The notice must contain the information required by A.R.S. § 41-1021(B)(1), (2), (3), (5), and (8). See Section 11.7.2. The Secretary of State format for the notice is provided in A.A.C. R1-1-205.

11.7.3 Developing the Rule Proposal. Once the docket is open, an agency should begin to draft the proposed rule so the public notice and comment can begin. This is a key stage in the rule-making proceeding, as careful drafting of the initial rule may reduce the likelihood of difficulties in later stages of the process. For example, the agency may solicit language or other input on the proposed rule from those who will be affected by the rule. A.R.S. § 41-1023(A). The agency must pay close attention to the format and drafting requirements set by the Secretary of State, which are discussed below.

11.7.3.1 Formal Rule-making Advisory Committees. If desired, an agency may appoint a formal advisory committee to comment on the subject matter of the proposed rule-making after filing the notice of rule-making docket opening, but before filing the notice of proposed rule-making. A.R.S. § 41-1021(D). If this is done, the membership of the committee must be published at the time of the committee's formation, and annually thereafter if necessary. Id. This is done by filing a "Notice of Formal Rulemaking Advisory Committee" with the Secretary of State in accordance with A.A.C. R1-1-206.

11.7.3.2 Drafting the Rule.

11.7.3.2.1 Format Requirements. The agency's proposed rule must conform with the form and style required by the Secretary of State. See A.A.C. R1-1-103 to -105, R1-1-205 to -210, and R1-1-401 to -415. The Secretary of State prescribes almost every aspect of rule-making format, including the font size (A.A.C. R1-1-103(C)), the numbering system (A.A.C. R1-1-403), the division of rules (A.A.C. R1-1-402 and A.A.C. R1-1-408), the
use of underlining and strike-outs A.A.C. R1-1-502), page numbering (A.A.C. R1-1-403(6)),
and citation form (A.A.C. R1-1-409).

"The secretary of state shall reject rules [that] are not in compliance with the
[Secretary of State’s] prescribed numbering system, form and style." A.R.S. § 41-1011(B).
Thus, an agency's rule writers should review carefully the Secretary of State’s rules before
drafting begins.

11.7.3.2.2 Codification Requirements. The codification of rules is done by the
Secretary of State in connection with the publication of the Arizona Administrative Code.
A.R.S. § 41-1011. The general organization of the code is found at A.A.C. R1-1-102. An
agency must obtain title and chapter assignments from the Secretary of State, and must
notify the Secretary of State when adding a new article or when a new chapter is needed.
See A.A.C. R1-1-501.

11.7.3.2.3 Drafting Guidelines. Rules must be "clear, concise and
understandable" before they can be approved by GRRC or the Attorney General. A.R.S.
§ 41-1052(D)(4) and A.R.S. §41-1044(B)(2). To meet that standard, virtually every word in
a rule must be clear, concise and understandable. General writing guidelines are provided
in the paragraphs that follow.

Under A.R.S. § 1-213, words and phrases are construed according to the common
and approved use of the language. Technical words and phrases and those that have
acquired a special meaning in the law are construed according to their technical or special
legal meaning. *Id.* Any word that an agency uses in a rule to mean something other than
its common and approved (dictionary) use or its special meaning in the law must be
defined specifically in the rule. Terms that are defined by statute have the same meaning
in a relevant rule and should not be redefined.

To meet the APA requirement that a rule be clear, concise, and understandable, the
rule must prescribe or proscribe conduct with words that establish an objectively
ascertainable standard. Words and phrases such as "when appropriate," "if necessary,"
"when proper," unless further defined in the rule, fail to establish an objectively
ascertainable standard.

One of the primary purposes of rule-making is to inform the public of the agency's
standards, its procedures, and the criteria upon which it will exercise its discretion. Rules
that contain statements such as "unless waived by the agency" or "unless approved by the
director" fail to set a clear standard. These terms are acceptable only if the rule contains
the criteria for obtaining a waiver or approval.

A rule must not contain words or terms such as "should," or "to the extent possible." These terms are vague and unenforceable.
The following are specific examples of proposed rules that fail to meet the standard of "clear, concise and understandable":

Proposal: Environmental laboratories shall have a safety plan.

Problems: The rule must prescribe the requirements of the safety plan; use of passive voice; need to state who is responsible.

Proposal: A laboratory shall design laboratory and storage areas such that the potential for sample contamination is minimized.

Problems: The rule must prescribe an objective minimum standard for sample contamination; avoid use of passive voice and clearly state who is responsible for the activity -- a laboratory is inanimate and incapable of designing areas; inappropriate use of “such.”

Proposal: The Department may issue a provisional license when its investigation identifies deficiencies, but the number and nature of deficiencies do not pose a significant risk to public health and safety.

Problems: The rule must define what constitutes a significant risk in objective or measurable terms. The rule must also define or delineate “deficiencies” and should set the standards the department will use to decide whether to exercise its discretion.

Proposal: Eye wash equipment shall be inspected and tested at regular intervals.

Problems: Once a week, once a year, and once every ten years are all "regular intervals." The rule must define what regular interval the agency requires or establish a maximum length of time between inspections (and tests). The rule should identify who is responsible for ensuring that the equipment is inspected and tested.

Proposal: Supervisors shall successfully complete a cyanide safety course approved by the director, or show proof of completing an approved course within the past twelve months.

Problems: Unless another rule or statute specifies what courses are approved, the rule must either specify the approved courses or prescribe the contents or subjects required to be covered in cyanide safety courses, qualifications of instructors, and minimum hours of instruction and prescribe
procedures for obtaining the director's approval. How does “successfully complete a cyanide safety course” differ from “completing an approved course?”

Proposal: All lines and valves in cyanide circuits shall be adequately identified.

Problems: The rule must specify the manner in which the lines and valves shall be identified and identify who is responsible to ensure that this is done. What is adequate to one person may be inadequate to another. The agency may want labels affixed to the lines and valves in a particular manner, at specified intervals, with a particular size lettering or with certain words, etc.

There are other guidelines that can ensure that a rule is clear, concise, and understandable, some of which are required by the Secretary of State. Examples include:

1. The heading of each “division” of a rule must clearly describe the subject of that subdivision of the rule. A.A.C. R1-1-402(B).

2. Each numbered rule should encompass one subject only.

3. Rules must be divided into divisions at logical breaks in the subject matter for convenient reference and in accordance with the Secretary of State's numbering system at A.A.C. R1-1-403.

4. Use the word "shall" when an action is mandatory and the word "may" when an action is discretionary; if "may" is used, the rule must contain criteria for the exercise of discretion.

5. Do not use terms such as "should," "will," "ought to," "if feasible," or "if possible."

6. References to statutes or other rules must be current and accurate.

7. Do not propose a rule that merely quotes or paraphrases statutory language or requirements.

8. 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. If it is necessary to, for example, express a delayed effective date (see A.R.S. § 41-1032(B)), that should be separately stated.
9. Do not use unnecessary verbiage such as "two (2)" or "rules and regulations."

10. Use the active voice.

11. Use the present tense.

12. Be consistent. Always use the same word or phrase to convey a particular meaning. Avoid synonyms, homonyms, and words that have more than one meaning.

13. Use singular nouns and pronouns instead of plural nouns and pronouns when possible.

14. Use definitions to explain the meaning of a frequently repeated word or phrase. Avoid definitions that are counterintuitive or substantively or syntactically mismatched.

15. Use gender-neutral language.

16. If you have more than two conditions in a rule, create a list. If any item in the list contains a comma, use semi-colons to separate the items in the list. Otherwise, use commas to separate the items in the list. End the list with a period.

17. Adhere to all principles of English grammar.

**11.7.3.2.4 Incorporation by Reference.** An agency may adopt by reference all or part of a rule, standard, or code that has been developed 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, “and shall state that the rule does not include any later amendments or editions of the incorporated matter.” Id. § (B). An agency can only incorporate by reference materials that are made available to the public for inspection and reproduction by the entity originally issuing the materials. Id. § (D). Future amendments or editions of the material cannot be incorporated by reference without amending the rule by complying with the APA. Id. § (E). An agency that makes a rule incorporating material by reference must state where a copy of the material is available from the agency. A.A.C. R1-1-414.

**11.7.3.3 Crafting the Preamble.** A preamble is a document prepared in connection with virtually every type of rule-making that contains detailed information about the rule and its background at every stage of the rule-making process. See A.R.S. §§ 41-
1001(15)(a), -1022(A)(1), -1024(E)(1), and (G). The purposes of the preamble are to explain the administrative history of the rule, to summarize the purpose of the rule, to provide citations to statutory authority, and to list prior notices published in the Register. The specific requirements for the preamble are set forth in A.R.S. § 41-1001(15).

The information required in the preamble depends on the type of rule-making and the stage of the process for which the preamble is prepared. For example, the preamble of a proposed rule-making explains when and how people may comment on the rule, while the preamble of a final rule-making contains the agency’s response to public comments and a description of changes between the proposed and final rule. The Secretary of State’s Office has developed forms for preambles in the *Arizona Rulemaking Manual*. It is important to address each question listed on the forms even if the answer is “not applicable.”

**11.7.3.4 Rules Affecting Small Business and the Statement of Effect on Small Business and Economic Impact Statement.** An agency must determine whether a proposed rule may impact small businesses and, if so, must reduce the impact to the extent possible by using 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.

A.R.S. § 41-1035. Thus, when drafting a rule, the agency must take these matters into account.

Also, when a rule package is submitted to GRRC or the Attorney General for approval, the package must include a statement of the effect of the rule on small businesses and an economic impact statement. A.R.S. §§ 41-1052(A), -1055. The required contents of this statement are listed in A.R.S. § 41-1055. The agency should
begin collecting the information necessary for this statement when the rule is being drafted. See Section 11.7.9.1.2 for a discussion of what the final statement requires.

11.7.3.5 Informal and Courtesy Reviews.

11.7.3.5.1 Informal Review by the Attorney General. The Attorney General's staff does not draft rules for an agency. After preparing a draft of the proposed rules, the agency should consult its Assistant Attorney General for advice and guidance. The Assistant Attorney General will review the rule for appropriate form and style, and will also assist the agency in determining whether the rules meet the statutory requirements for approval.

11.7.3.5.2 Courtesy Review by GRRC. GRRC staff does not draft rules for an agency but will review a rule at any time in the rule-making process to assist an agency to comply with the form and style requirements of the Secretary of State and with substantive legal requirements. An agency will find that a courtesy review by GRRC staff is most useful if done before the rule is published in proposed form.

11.7.4 Filing the Notice of Proposed Rule-making. Once the rule is drafted, the agency must notify members of the public of the proposed rule so the public may comment on the rule. This is done by filing a "Notice of Proposed Rulemaking," with the Secretary of State and by sending individual notice to each person who has requested notification of rule-makings from the agency. A.R.S. § 41-1022(A) and (C). The contents of the notice are prescribed by A.R.S. § 41-1022(A) and A.A.C. R1-1-502.

11.7.5 Early Review Petitions. Under A.R.S. § 41-1052(B), at any time after the notice of proposed rulemaking is published, a person who would be adversely affected by an agency’s proposed rule may file with GRRC an early review petition alleging that the rule fails to meet the criteria in A.R.S. § 41-1052(D). The agency may respond to the early review petition to demonstrate its compliance with the requirements of the APA. GRRC then rules on the early review petition.

11.7.6 Public Comment Period. Following publication of the notice of proposed rule-making, an agency must provide the public with a reasonable opportunity to comment on the proposed rule. A.R.S. § 41-1023. Comments may be written, oral, or both. Id.

11.7.6.1 Written Comment Period. For at least thirty days after the publication in the Register of a notice of proposed rule-making an agency must afford an opportunity to submit written statements, arguments, data, and views on the proposed rule. A.R.S. § 41-1023(B); A.A.C. R1-1-503.

11.7.6.2 Conduct and Record of the Oral Proceeding. An agency must conduct an oral proceeding if requested by any one person within thirty days after publication of the
notice of proposed rule-making. A.R.S. § 41-1023(C); A.A.C. R1-1-504. An agency may schedule an oral proceeding without a request. The agency must choose a time and location for the oral proceeding that affords the public a reasonable opportunity to participate. A.R.S. § 41-1023(D).

11.7.6.2.1 Timing of the Oral Proceeding. The oral proceeding cannot be held earlier than thirty days after publication of a notice in the Register of its location and time. A.R.S. § 41-1023(D).

An agency may include the notice of oral proceeding in the preamble to the notice of proposed rule-making. See A.A.C. R1-1-504. An agency that wishes to expeditiously make a rule should schedule an oral proceeding without waiting for a written request so the oral proceeding can be held immediately after the written comment period.

If an agency does not include the notice of oral proceedings in the preamble to the notice of proposed rule-making, and later receives a request for an oral proceeding, the agency must set a time and place for the oral proceeding and file the required copies of a "Notice of Public Hearing on Proposed Rulemaking" with the Secretary of State for publication in the Register. A.A.C. R1-1-504. Enough lead time must be included so that the public hearing does not occur until thirty days after the notice is published in the Register.

11.7.6.2.2 Conducting the Oral Proceeding. An agency must conduct the oral proceeding in a manner that allows adequate discussion of the substance and form of the proposed rule. A.R.S. § 41-1023(D). Thus, the agency must hold the proceeding at a location that is easily accessible and provides adequate space to accommodate those in attendance. The notice and accommodations must satisfy the Americans With Disabilities Act (ADA). See Chapter 15. See also Chapter 7 for procedures required of agencies subject to the Open Meeting Law.

The oral proceeding may be presided over by the members of the agency who must ultimately decide on adoption of the rule, a member of the agency, or another presiding officer designated by the agency. A.R.S. § 41-1023 (E). If the members of the agency who must ultimately decide on adoption of the rule do not preside, the presiding officer must prepare a memorandum summarizing the contents of the presentations made at the proceeding. Id.

At the outset of the oral proceeding, the presiding officer should present a statement of the reasons for proposing the rule. This statement should identify the issues that necessitated the rulemaking and the statutory basis for the rule. The presiding officer should also announce any changes that the agency has considered after publication of the notice of proposed rulemaking.
An oral proceeding is not an adversarial proceeding, and for that reason, those making statements need not be placed under oath. The purpose of an oral proceeding is to allow for questions by the public about the rule and to allow the submission of argument, data, and views that may guide the agency in its rule-making. A.R.S. § 41-1023(D). Because the public is allowed to seek information about the rule at the proceeding, the agency should have available those individuals who have information about the subject of the rule.

To ensure a fair and efficient oral proceeding, the presiding officer must enforce proper conduct. The presiding officer should officially recognize a person before he or she speaks. 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. Each person who speaks at the oral proceeding, when recognized, may make a statement limited to the subject of the oral proceeding. After the statement is concluded, the presiding officer or other agency members may question the speaker.

Agencies may make rules for the conduct of oral rule-making proceedings, including provisions to prevent undue repetition. A.R.S. § 41-1023(F).

Because the primary object of the oral proceeding is to gather relevant information to help determine policy, the presiding officer should ensure that someone maintains a list of all physical and documentary material submitted in connection with the proceeding. The presiding officer should also ensure that each exhibit is clearly identified and marked.

All oral proceedings must be recorded by stenographic or other means. A.R.S. § 41-1023(E). The presiding officer should keep a list of persons who present statements at the oral proceeding, consisting of each speaker’s name, address and, if applicable, the name of the entity the person represents. The list should record whether the speaker testified in favor of or in opposition to the proposed rule and other appropriate information. See id. A person wishing to testify without being identified is entitled to do so, unless the agency is subject to the Open Meeting law, in which case the person must provide a name for the minutes. A.R.S. § 38-431.01(B)(4). All rulings of the presiding officer should be made a matter of record.

A person making or voting on the making of a rule who was not in attendance throughout the oral proceedings must review the record before making or voting on the making of the rule. See A.R.S. § 41-1024(C).

11.7.7 Close of the Record. An agency may not submit a rule to GRRC or the Attorney General (for non-emergency rules) for its approval until the rule-making record is closed. A.R.S. § 41-1024(A); A.A.C. R1-1-505. The close of the record occurs on the date
that the agency chooses as the last date it will accept public comments. A.A.C. R1-1-505. The APA has no time limit for closing the record; however, the record must be complete and closed within a reasonable time from the oral proceedings or deadline for submitting written public comment. Furthermore, no longer than one year may elapse between the time of the publication of the notice of proposed rule-making and submission of the rule to GRRC for approval. A.R.S. § 41-1021(A)(2).

**11.7.8 Modifications to the Rule After Public Comment.** Before submitting a rule to GRRC, the agency must consider the written submissions, the oral submissions (or the summary memorandum from an oral proceeding), and the economic, small business and consumer impact statement. A.R.S. § 41-1024(C). After considering the public comments, the agency must adequately address each comment, which may cause the agency to modify the rule. The agency should use its experience, technical competence, specialized knowledge, and judgment in making the rule. *Id. § (D).* A person adopting or voting on the adoption of a rule who was not in attendance throughout the oral proceedings must review the record before adopting or voting on the adoption of the rule. See A.R.S. § 41-1024(C).

**11.7.8.1 Effect of Substantial Changes to the Rule.** If a rule is modified, and the modified rule is not "substantially different from the proposed rule," the rule-making process may continue. A.R.S. § 41-1025(A). The agency must consider the following criteria to determine whether the modified rule is substantially different from the proposed rule:

1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.

2. The extent to which the subject matter of the 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 rule differ from the effects of the published proposed rule. . . .

*Id. § (B).*

**11.7.8.2 Options if Substantial Changes to the Rule Occur.** If the agency decides that changes make a rule substantially different from what was proposed, the agency may do one of two things. First, it may prepare and file with the Secretary of State a "Notice of Supplemental Proposed Rulemaking." and provide for additional public comment under A.R.S. § 41-1023. See A.R.S. § 41-1022(E). The Secretary of State's requirements for a supplemental notice are contained in A.A.C. R1-1-507.
Second, an agency may file a Notice of Termination of Rule-making Proceeding with the Secretary of State and comply anew with all requirements of the APA. A.R.S. § 41-1025(A). The required submission for a termination notice is at A.A.C. R1-1-506.

11.7.9 Final Document Preparation and Filing the Rule with GRRC for Approval. Before filing a rule with the Secretary of State, an agency must receive GRRC's approval of the rule, the preamble, and the economic, small business, and consumer impact statement. A.R.S. § 41-1052. Once the record is closed, an agency has 120 days to prepare the final documents and submit them to GRRC for approval. A.R.S. § 41-1024(B). See also id. § (H) (in regular rule-making, a rule cannot be filed with the Secretary of State without the prior approval of GRRC).

11.7.9.1 Compiling the Rule Package for GRRC Consideration. The APA specifies that a rule package be compiled and submitted to GRRC with the following items: (1) the preamble; (2) the exact words of the rule; and (3) the economic, small business, and consumer impact statement. A.R.S. § 41-1024(E). Remember to check GRRC rules for its submission requirements in case any changes have occurred. See Section 11.7.8.2.

11.7.9.1.1 The Preamble. Subsection § 41-1001(15) lists the information that must be included in the preamble. This Chapter discusses the preamble at Section 11.7.3.3.

11.7.9.1.2 The Economic, Small Business, Consumer Impact Statement (EIS). The EIS is a document designed to explain the economic impact of a rule. Nearly all rule-making has some impact on the economy. For example, even the act of repealing an out-of-date rule may have economic impact by reducing litigation or clarifying regulatory requirements.

It is important to distinguish the impact of the rule from the impact of the legislation underlying the rule. Only the impact of the rule itself should be dealt with in the EIS.

Because the drafting and public comment stages of the rule-making process may reveal information for the EIS, it is important to begin the process of collecting information in connection with the EIS from the start of the rule-making process. Typical topics addressed by the EIS are fee adjustments; restrictions on entry into a profession or occupation; giving or withholding permission to the general public; timeframes for licenses or grants of permission; or problems that the regulated community may want addressed. An EIS might address:

1. Who is being helped or hurt by the rule?

2. What does the rule do to the affected community? What effects are projected?
3. Where is the population of the affected community located?

4. Why is the rule being created? Does it address a problem raised by other rules?

5. When will the rules be effective?

A.R.S. §41-1055(A) requires an agency to provide an economic, small business and consumer impact summary in the preamble. The summary need not restate the EIS verbatim, or even comprehensively address all of the information in the EIS. See A.R.S. § 41-1055(A).

The summary must include all of the following:

1. The conduct and its frequency of occurrence that the rule is designed to change.

2. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed.

3. The estimated change in frequency of the targeted conduct expected from the rule change.

4. A brief summary of the information included in the economic, small business and consumer impact statement.

5. If the economic, small business and consumer impact summary accompanies a proposed rule or a proposed summary rule, the name and address of agency employees who may be contacted to submit or request additional data on the information included in the economic, small business and consumer impact statement.

There is no format required of an EIS. Agencies, however, should follow the outline in A.R.S. § 41-1055 (B), which requires:

1. An identification of the proposed rule-making.

2. An identification of the persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rule-making.

3. A cost benefit analysis of the following:
(a) The probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rule-making. The probable costs to the implementing agency shall include the numbers of new full-time employees necessary to implement and enforce the proposed rule. The preparer of the economic, small business and consumer impact statement shall notify the joint legislative budget committee of the number of new full-time employees necessary to implement and enforce the rule before the rule is approved by the council.

(b) The probable costs and benefits to any political subdivision directly affected by the implementation and enforcement of the proposed rule-making.

(c) The probable costs and benefits to businesses directly affected by the proposed rule-making, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rule-making.

4. A general description of the probable impact on private and public employment in businesses, agencies and political subdivisions of this state directly affected by the proposed rule-making.

5. A statement of the probable impact of the proposed rule-making on small businesses. The statement shall include:

(a) An identification of the small businesses subject to the proposed rule-making.

(b) The administrative and other costs required for compliance with the proposed rule-making.

(c) A description of the methods that the agency may use to reduce the impact on small businesses. These methods may include:

(i) Establishing less costly compliance requirements in the proposed rule-making for small businesses.

(ii) Establishing less costly schedules or less stringent deadlines for compliance in the proposed rule-making.
(iii) Exempting small businesses from any or all requirements of the proposed rule-making.

(d) The probable cost and benefit to private persons and consumers who are directly affected by the proposed rule-making.

6. A statement of the probable effect on state revenues.

7. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule-making, including the monetizing of the costs and benefits for each option and providing the rationale for not using non-selected alternatives.

This cost-benefit analysis is required to calculate only the costs and benefits that occur in Arizona. However, it is important to note that if a person submits an analysis to the agency that compares the rule’s impact on the competitiveness of businesses in Arizona to the impact on businesses in other states, the agency is required to consider that analysis. A.R.S. § 41-1055(G).

11.7.9.2 Submission for Approval by GRRC.

11.7.9.2.1 Procedures for GRRC Approval. Once an agency compiles the required rule package, the agency must submit the documentation to GRRC in a two-step process. Initially, the agency must prepare and deliver two rule packages that meet the requirements set by both GRRC and the Secretary of State. See A.A.C. R1-6-104(A). The package must include a cover letter that supplies specific information about the rule-making history, and the documents comprising the rule package must be presented in the order specified in the rule. Id. In addition, the agency must supply one copy of all written comments received concerning the proposed rule, and all materials incorporated by reference. A.A.C. R1-6-104(B). GRRC staff will review this information for compliance with the rules and the standards in the statutes, and suggest changes to the agency.

After the agency makes needed changes, the agency must submit to GRRC four paper copies of the rule package and a computer disk containing the complete rule package. A.A.C. R1-6-104(C).

Once the final rule package is submitted, GRRC has 120 days to approve or return the rule package. A.R.S. § 41-1052(C). When the package is initially sent to GRRC, the rule will be placed on an agenda for an upcoming meeting of GRRC for consideration. A.A.C. R1-6-104(C). The time for the meeting at which the rule package will be considered depends on when a rule is submitted to GRRC. If an agency has a specific timing
requirement, the agency should contact GRRC staff to obtain a schedule so the rule package can be timely scheduled. An agency head can request that a rule be moved to a later meeting of GRRC. A.A.C. R1-6-104(D).

GRRC will consider the rule package at a meeting open to the public. An agency representative must appear at a public meeting of GRRC (usually held the first Tuesday of each month) to respond to questions of the members of GRRC. A.R.S. § 41-1052(F)(6); A.A.C. R1-6-110(A). Additionally, because GRRC’s process is open and allows public written and oral comment, it may be necessary for the agency representative to respond to the comments of others. See A.A.C. R1-6-111(providing for public comment).

11.7.9.2.2 Standards for GRRC Approval. GRRC cannot approve a rule unless:

1. The economic, small business and consumer impact statement contains the information, data, and analysis prescribed by [the APA] and is generally accurate.

2. The probable benefits of the rule outweigh the probable costs of the rule.

3. The rule is clear, concise, and understandable.

4. The rule is not illegal, inconsistent with the legislative intent, or beyond the agency’s statutory authority.

5. The agency adequately addresses the comments on the proposed rule and any supplemental proposals.

6. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental proposals.

7. The preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency’s evaluation or justification for the rule.

8. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of the federal law.
9. If a rule requires a permit, the permitting requirement complies with A.R.S. § 41-1037.

A.R.S. § 41-1052(D).

GRRC may not approve a rule that contains a fee increase unless two-thirds of the voting quorum of GRRC votes to approve the rule. A.R.S. § 41-1052(E).

11.7.9.2.3 Procedure upon GRRC Approval. If approved, GRRC will submit an agency’s final rule packet to the Secretary of State. A.A.C. R1-6-108(A). If the approval by GRRC is contingent upon the agency making changes to any part of the rule package, the agency shall submit the revised rule package documents, and the GRRC staff shall ensure that all changes are made prior to submission to the Secretary of State. Id. § B. No other changes may be made to the rule package except those required by GRRC. Id. § C.

11.7.9.2.4 Procedure upon GRRC Return of Rule. GRRC may vote to return a rule if it does not comply with the statutory requirements, identifying the manner in which the rule package fails. A.R.S. § 41-1052(C); A.A.C. R1-6-109. If a rule is returned by GRRC, the agency may resubmit the rule after consultation with GRRC staff. Id. Any changes to the rule made prior to resubmission must be clearly identified, together with an explanation of how the changes ensure that the rule package complies with the statutory requirements for GRRC approval. An agency representative must be present when GRRC considers the resubmitted rule.

11.7.10 Final Filing with the Secretary of State. If GRRC approves the rule package, GRRC will submit the final rule package to the Secretary of State. A.A.C. R1-6-108. The agency, however, must supply GRRC within fourteen days after approval information concerning any changes required by GRRC and an original and three copies of the approved rule package along with a computer disk containing all of the required documentation. See A.A.C. R1-6-107.

11.7.11 Termination of Rule-making Prior to Final Filing. If an agency chooses not to go forward with a proposed rule at any time during the rule-making process, or the agency wishes to make a rule that is substantially different from a proposed rule, it must file a "Notice of Termination of Rulemaking" with the Secretary of State. A.R.S. §§ 41-1021(A), -1025(A); A.A.C. R1-1-506. The notice must attach a copy of the original notice of proposed rule-making.

A rule-making proceeding will also terminate if certain time limits are not satisfied – e.g., if the agency does not file its notice of proposed rule-making within one year of the filing of the notice of docket opening, or if the agency does not submit a rule for approval by GRRC within one year after the filing of the notice of proposed rule-making. A.R.S. § 41-1021(A).
11.8 Emergency Adoption of Rules.

If an agency makes a specific finding that a rule is necessary as an emergency measure, a rule may be made, amended, or repealed as an emergency measure without the public notice and comment requirements of A.R.S. §§ 41-1021 and -1022, and without the approval of GRRC. A.R.S. § 41-1026. However, an agency making, amending, or repealing a rule under the emergency rule-making procedures must obtain prior approval of the rule from the Attorney General. A.R.S. § 41-1026(A).

An emergency rule is valid for only 180 days. Id. § (D). An emergency certification may be renewed for one more 180-day period if the agency determines the emergency situation still exists and the agency seeks approval of the renewal from the Attorney General before the existing 180-day term expires. The same procedures for emergency certification are followed for a renewal. Id. Therefore, for any renewal the Attorney General must reevaluate the facts surrounding the adoption of the rule as an emergency measure.

11.8.1 Standards for Emergency Rule-making. Whether an emergency justifying the use of emergency rule-making procedures exists is typically within the discretion of the agency. The Attorney General, however, is prohibited from approving an emergency rule if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the notice and public participation provisions of the APA, unless the agency submits substantial evidence that the rule is necessary to do any of the following:

1. Protect the public health, safety or welfare.
2. Comply with deadlines in amendments to an agency’s governing law or federal programs.
3. Avoid the violation of any federal law or regulation or other state law.
4. Avoid an imminent budget reduction.
5. Avoid serious prejudice to the interests of the public or the parties concerned.

A.R.S. § 41-1026(A). Thus, the Attorney General will closely scrutinize the facts supporting emergency certification to decide whether a bona fide emergency exists. Id.

11.8.2 Procedures for Emergency Rule-making. When submitting an emergency rule-making package to the Attorney General for approval, the agency should comply with
the Secretary of State’s format requirements in A.A.C. R1-1-701. The Secretary of State requires that a “Notice of Emergency Rulemaking” contain very specific information in the “Preamble.” Id. § (A). The package should also include an agency certification as prescribed at A.A.C. R1-1-105. See A.A.C. R1-1-701(B).

One of the requirements of the notice is an explanation of the situation justifying the rule’s adoption as an emergency rule. A.A.C. R1-1-701(A)(11). This section provides the agency an opportunity to explain its finding of emergency.

Under A.R.S. § 41-1026(B), the Attorney General has sixty days to review the emergency and is required to determine if the rule complies with the standards prescribed in A.R.S. § 41-1044(B), including whether the rule:

1. Is in the correct form;
2. Is clear, concise, and understandable;
3. Is within the agency’s power and the enacted legislative standards; and
4. Is made in compliance with the appropriate procedures.

If the Attorney General approves the emergency rule-making, the Attorney General will sign an approval form and attach it to the first page of the original Notice of Emergency Rulemaking. The Attorney General will then forward the original and two copies of the notice to the Secretary of State. A.A.C. R1-1-701(C). The Secretary of State will then publish the rule in the Register as provided in A.R.S. § 41-1013. A.R.S. § 41-1026(C).

If the Attorney General does not approve the emergency rule-making, the package will be returned to the agency.

11.8.3 Effective Dates and Renewal of Emergency Rule. Any rule adopted as an emergency rule is effective from the date it is filed with the Secretary of State, and will expire after 180 days, unless it is timely renewed. A.R.S. § 41-1026(D).

An emergency rule may be renewed for one additional 180-day period if the agency determines that the emergency situation still exists and again obtains the Attorney General’s approval using the procedures above prior to the expiration of the 180-day period. A.R.S. § 41-1026(D). In addition, before a renewal may be obtained, the agency must first issue the rule as a proposed rule or as an alternative proposed rule under A.R.S. § 41-1022. Id. To obtain a renewal of an emergency rule, the agency must prepare a notice using the same format required for the original emergency rule-making, and again obtain the required Attorney General approval. A.R.S. § 41-1026(D); see also A.A.C. R1-1-701(F). If the renewal is approved, it will be forwarded to the Secretary of State for publication in the

11-27    Revised 2011
Register. *Id.* If the text of the renewed emergency rule differs from the text of the previous emergency rule, the agency shall submit a list of every change made with the notice of renewal. A.A.C. R1-1-701(E).

11.8.4 Attaining Permanent Status for Emergency Rule. An emergency rule may be made permanent by following the regular rule-making procedures. If a permanent rule is made and certified before the emergency rule expires, the permanent rule must expressly state that it repeals the emergency rule if it has not expired. A.R.S. § 41-1026(E).

11.8.5 Emergency Adoption of a Delegation Agreement. The APA also provides for the emergency adoption of a delegation agreement if an agency makes a written finding that the agreement is "necessary for immediate preservation of the public health, safety or welfare, and the public notice and participation requirements of this article are impracticable." A.R.S. § 41-1026.01(D). An agency is prohibited from using the emergency process "if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the public notice and participation provisions of [the APA], unless the agency can present substantial evidence that failure to adopt, amend or terminate the delegation agreement as an emergency measure will result in imminent substantial peril to the public health, safety or welfare." A.R.S. § 41-1026.01(A).

The adoption of an emergency delegation agreement does not require the approval of the Attorney General. Instead, the agency simply files with the Secretary of State a summary of the emergency delegation agreement, which is then published in the next Register. A.R.S. § 41-1026.01(B). The emergency delegation agreement is valid for 180 days, and may be renewed for one or two more 180-day periods if the agency determines that the emergency situation still exists, the agency follows the statutory renewal procedures, the agency has begun the public comment process, and the agency files a notice of renewal with the Secretary of State.

A.R.S. § 41-1026.01(C). The renewal must be accomplished prior to expiration of the preceding 180-day emergency period. *Id.*

11.9 Summary Rule-making Procedures. The APA allows for an abbreviated rule-making process in three very narrow circumstances -- (1) to repeal a rule that is obsolete because of changes to the authorizing statutes; (2) to make, amend, or repeal rules that repeat verbatim the statutes authorizing the rule and (3) repeal of other obsolete rules or rules deemed by the agency to be ineffective as long as the repeal does not increase the cost of compliance or reduce procedural rights of the persons regulated. A.R.S. § 41-1027(A).

To initiate the summary rule-making process, an agency must prepare and file with both the Secretary of State and GRRC a "Notice of Proposed Summary Rulemaking."
A.R.S. § 41-1027(B). See also A.A.C. R1-1-801 and A.A.C. R1-6-105. The notice must contain a preamble. A.R.S. § 41-1027(B). The format for the notice filing with the Secretary of State is specified at A.A.C. R1-1-801. The requirements for submission to GRRC are contained in A.A.C. R1-6-105.

Within ninety days after publication of the Notice of Proposed Summary Rulemaking in the Register, and after consideration of any comments, the agency shall submit to GRRC four paper copies of the “Notice of Final Summary Rulemaking,” the preamble, the concise explanatory statement, and the economic, small business and consumer impact statement, together with one copy of any comments received on the summary rule-making and a computer disk containing all required documentation. A.R.S. § 41-1027(E); A.A.C. R1-6-106; A.A.C. R1-1-801(C). GRRC will then place the summary rule on the consent agenda for approval unless a member of GRRC requests a hearing. A.R.S. § 41-1053(A). GRRC can at any time disapprove the summary rule-making and order the agency to comply with regular rule-making procedures. Id. § (D).

After approval, GRRC will file the summary rule with the Secretary of State. To accomplish this, within fourteen days of GRRC’s approval of the summary rule-making, the agency must submit an original and three copies of the “Notice of Final Summary Rulemaking” for filing with the Secretary of State. A.A.C. R1-6-107. Section 11.7.9 provides more information about supplying documents to GRRC for final filing with the Secretary of State.

11.9.1 Effective Date of Summary Rule. The proposed summary rule takes effect upon the publication of the notice of proposed summary rule-making in the Register. A.R.S. § 41-1027(D). The interim effectiveness of the proposed summary rule-making is revoked if GRRC disapproves the summary rule. A.R.S. § 41-1053(D).

11.10 Effective Date for Rules - Generally. Rules become effective sixty days after filing with the Secretary of State. A.R.S. § 41-1032. However, there are two exceptions:

1. When the agency includes in the preamble sufficient information demonstrating that the rule needs to be effective immediately upon the filing with the Secretary of State. A rule may be immediately effective only for any of the following reasons:

   a. To preserve the public peace, health or safety.

   b. To avoid a violation of federal law or regulation or state law, if the need for an immediate effective date is not created due to the agency’s delay or inaction.
c. To comply with deadlines in amendments to an agency’s governing statute or federal programs, if the need for an immediate effective date is not created due to the agency’s delay or inaction.

d. To provide a benefit to the public and a penalty is not associated with a violation of the rule.

e. To adopt a rule that is less stringent than the rule that is currently in effect and that does not have an impact on the public health, safety, welfare or environment, or that does not affect the public involvement and public participation process.

2. The agency may specify an effective date more than sixty days after the filing of the rule with the Secretary of State if the agency determines good cause exists and the public interest will not be harmed by the later effective date.

A.R.S. §41-1032(A) and (B). In its review of the proposed rules, GRRC and the Attorney General’s Office will review the sufficiency of the information provided by the agency justifying an immediate effective date. To approve a rule with an immediate effective requires a two-thirds vote from GRRC’s voting quorum. A.R.S. §41-1052(F).

11.11 Publication of Directory for Rules and Substantive Policy Statements. The APA requires each agency to publish at least every year a directory summarizing the subject matter of all currently applicable rules and substantive policy statements. A.R.S. § 41-1091(C). The agency is required to keep this publication at one location. Id. The directory, rules, substantive policy statements, and any material incorporated by reference, must be open to the public for inspection at the office of the agency’s director. Id. Every June 30, each agency head must inform GRRC that the agency is in compliance with this requirement. Id. § (D).

11.12 Post-Rule Challenge to Economic Impact Statement. Within two years after a rule is finalized, any person who is or may be affected by the rule may file a written petition with the agency objecting to all or part of the rule on the grounds that the actual economic, small business or consumer impact significantly exceeds that estimated when the rule was made or that the actual impact of the rule imposes a significant burden on persons subject to the rule. A.R.S. § 41-1056.01. Within thirty days of the petition, the agency must reevaluate the rule and file a notice in the register concerning the petition. A.R.S. § 41-1056.01(C). After a public comment period, the agency must decide whether to amend or repeal the rule. Id. The agency’s decision may be appealed to GRRC. If three members of GRRC request within two weeks after the appeal is filed that the matter be
heard by the council, the appeal will be placed on GRRC’s agenda. A.R.S. § 41-1056.01(E). The procedures for GRRC consideration of the appeal are contained in A.R.S. § 41-1056.01(E), (F), (G), and A.A.C. R1-6-401.

**11.13 Petition for Rule-making or a Declaration that a Practice Is a Rule.** Any person who believes that an agency has an existing practice or substantive policy statement that is in reality a “rule” may seek a declaration of that fact in two ways:

1. By petitioning the agency to turn the practice or policy into a rule, with an appeal of any refusal to GRRC, or

2. By seeking a declaration in superior court.

A.R.S. §§ 41-1033, -1034. A person may first petition the agency for a rulemaking, appeal to GRRC, and then file a declaratory judgment action in superior court, or go straight to superior court. *Id.*

The form and procedural requirements for GRRC’s handling of an appeal from the denial of a petition for rulemaking is at A.A.C. R1-6-302. The sole issue in an appeal to GRRC is whether the agency practice or substantive policy statement constitutes a rule. A.R.S. § 41-1033(B). If GRRC finds that the practice does constitute a rule, the practice is considered void. A.R.S. § 41-1033(C). If GRRC finds the practice is not a rule, the affected party may then seek declaratory relief pursuant to A.R.S. § 41-1034. A.R.S. § 41-1033(D).

**11.14 Five-Year Review Reports.** At least once every five years, each agency must review all of its rules to determine whether the agency should amend or repeal the rules and file a written report summarizing its findings and proposed course of action with GRRC. A.R.S. § 41-1056. GRRC maintains a schedule for the review of all rules published by each agency and must notify the agency at least ninety days prior to the agency’s deadline. A.R.S. § 41-1056(G). GRRC may reschedule the review of a rule if it has been made or substantially revised within the last two years. A.R.S. § 41-1056(C); A.A.C. R1-6-113. An agency may request a 120-day extension if it cannot submit the report on the due date. A.R.S. § 41-1056(D). The agency must request the extension before the original deadline and explain the reason for the extension.

If the agency fails to submit the report within the required or extended deadline, the rules automatically expire. A.R.S. § 41-1056(E). GRRC notifies the Secretary of State and the agency of the expiration, and causes a notice to be published in the next Register that states the rules have expired and are unenforceable. *Id.* To reestablish an expired rule, the agency must go through the regular rule-making process. A.R.S. § 41-1056(F).
By June 30 of each year, an agency is required to report to GRRC the agency’s progress toward completion of the course of action established in all five-year review reports submitted to GRRC during the previous five years. A.R.S. § 41-1056(H).

11.15 Important Dates for Submission of Reports to GRRC. The APA establishes several annual deadlines for the submission of reports to GRRC, who must generally pass the information on to the Legislature. The reports must be submitted by the agency head. These include:

June 30 – Certification of compliance with the substantive policy statement directory requirement. See A.R.S. § 41-1091(D).


11.16 Annual Regulatory Report. Pursuant to A.R.S. § 41-1021.02, on or before December 1, of each year, every agency, except for self-supporting agencies, is required to prepare and make available for public inspection a regulatory agenda that the agency expects to follow during the next calendar year. The agenda is to include a notice of docket openings, notices of proposed rule-making, review of existing rules and notice of final rules. Additionally, the agenda should include any rule-making terminated during the calendar year and disclose any privatization option and nontraditional regulatory approach being considered by the agency. An agency may still undertake a rule-making action even if the action was not included in the annually regulatory agenda.
CHAPTER 12

ENFORCEMENT

Table of Contents

Section 12.1  Scope of This Chapter
Section 12.2  Development of an Enforcement Philosophy
Section 12.3  Investigations
  12.3.1 Authority to Conduct Investigations
  12.3.2 Noncompulsory Investigative Powers
  12.3.3 Compulsory Investigative Powers
    12.3.3.1 Required Records and Reports
    12.3.3.2 On-site Inspection of Business Premises and Records
    12.3.3.3 Subpoenas
    12.3.3.4 Agency Ordered Evaluations
  12.3.4 Immunity
  12.3.5 Drawing Adverse Inferences from the Invocation of the Fifth Amendment Privilege
  12.3.6 Other Sources of Information
Section 12.4  Administrative Enforcement
  12.4.1 Informal Dispositions
    12.4.1.1 Disposition by Correspondence
    12.4.1.2 Disposition by Informal Meeting
    12.4.1.3 Disposition by Informal Statutory Proceedings
  12.4.2 Consent Orders

Revised 2011
12.4.3 Sanctions Available in Disciplinary Actions

12.4.3.1 Revocation or Suspension

12.4.3.2 Summary Suspension

12.4.3.3 Denial of Renewal

12.4.3.4 Probation

12.4.3.5 Cease and Desist Orders

12.4.3.6 Administrative and Civil Penalties

12.4.3.7 Censure

12.4.3.8 Non-disciplinary Sanctions

12.4.3.9 Restricted or Conditional Licenses

Section 12.5 Civil Enforcement

12.5.1 Injunctive Actions

Section 12.6 Criminal Enforcement

Section 12.7 Double Jeopardy

Section 12.8 Jurisdiction on Indian Reservations
CHAPTER 12
ENFORCEMENT

12.1 Scope of This Chapter. This Chapter describes the various enforcement powers available to a state agency and the strategies available for implementing those powers. See also Chapters 9 (Licensing) and 10 (Administrative Adjudications). The term “license” in this Chapter “includes the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, but it does not include a license required solely for revenue purposes.” A.R.S. § 41-1001(11). This Chapter also discusses statutory and constitutional limits on agency enforcement efforts, including restrictions on the enforcement of state laws on Indian reservations.

12.2 Development of an Enforcement Philosophy. As used in this Chapter, the term “enforcement” means the steps that may be taken to ensure compliance with regulatory laws, to remedy violations, and to impose sanctions for violations. Agencies should seek to develop an enforcement philosophy that effectively persuades the regulated parties to comply with applicable law with a minimum of formal proceedings. For example, promulgating clear and meaningful rules and substantive policy statements may be more effective in accomplishing enforcement objectives than investigations, complaint proceedings, and disciplinary actions. (See section 11.3.1 for a discussion on substantive policy statements).

Traditionally, many administrative agencies have focused their enforcement efforts on reacting to problems called to their attention. Unfortunately, “reactive” enforcement often occurs too late to provide meaningful protection to the public. Another approach is “pro-active” enforcement. A pro-active approach prevents problems from occurring in the first place, identifies problems in their early stages before substantial damage has occurred, and actively searches out violations of the law. These goals may be attained by instituting education programs for consumers and the regulated industries, monitoring business trends that may foretell significant problems, publishing and distributing newsletters, posting disciplinary actions on the agency’s website for the education of other regulated persons, and soliciting input from the regulated industries and law enforcement agencies.

1 Throughout this Chapter, “agency” means “any board, commission, department, officer, or other administrative unit of this state, including the agency head and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head, whether created under the Constitution of Arizona or by enactment of the legislature.” A.R.S. § 41-1001(1).
12.3 Investigations.

12.3.1 Authority to Conduct Investigations. An agency’s investigative authority is based on the agency’s enabling legislation. As a general rule, the Legislature has provided each administrative agency with the authority to conduct investigations to determine whether someone has violated the laws administered by the agency. See, e.g., A.R.S. §§ 32-573(A), -1451(C).

12.3.2 Noncompulsory Investigative Powers. Some complaints or suspected violations are investigated through the use of noncompulsory investigative powers. Noncompulsory investigative powers include oral and written inquiries of victims, witnesses, and those suspected of violating agency laws. For example, an agency may write to a person who is the subject of a complaint and request a response to the complaint. Absent specific statutory authority, the agency may not compel the person to provide a response. See, e.g., A.R.S. § 32-1744(B). An initial response to a complaint may resolve the matter without further investigation. If the response, however, does not fully resolve the matter, the agency should initiate an investigation of the complaint which may include an exercise of compulsory powers, such as an investigative subpoena, to obtain information relating to the complaint.

12.3.3 Compulsory Investigative Powers. Compulsory investigative powers include the power to compel a person to give sworn testimony, produce records, file reports, maintain records, or undergo an evaluation to determine safety or competency to practice. See, e.g., A.R.S. §§ 32-703(C), -1264, -1207(B)(6) -1451.01.

12.3.3.1 Required Records and Reports. An agency may require that records and reports be maintained or filed with the agency if authorized to do so by statute or a properly promulgated rule. Such a requirement can be a valuable tool for ascertaining compliance with agency laws. Periodic reports may alert an agency to problems in a regulated business or industry without the agency having to conduct repeated field investigations or inspections. See, e.g., A.R.S. § 32-1264.

12.3.3.2 On-site Inspection of Business Premises and Records. An agency may not enter a business and inspect its premises, operations, books, or records without a specific statutory grant of authority, unless the business consents to the on-site inspection. See, e.g., A.R.S. §§ 4-118, 32-504(B), 32-1904(A)(4).

An agency inspector conducting an on-site inspection must follow the procedures set forth in A.R.S. § 41-1009. The agency inspector must make certain disclosures and provide certain information to the regulated person. A.R.S. § 41-1009(A)-(J). An agency inspector’s failure to comply with these requirements constitutes cause for disciplinary action or dismissal of the agency inspector and shall be considered by the court or administrative law judge as grounds for a reduction of any fine or civil penalty levied against a regulated party. A.R.S. § 41-1009(O). A regulated party, however, may not seek
to have evidence gathered in violation of A.R.S. § 41-1009 excluded from a civil or administrative proceeding. A.R.S. § 41-1009(N).

The procedural requirements of A.R.S. § 41-1009 do not apply to all contact between state agencies and regulated persons. This statute applies only to inspections necessary to issue a license or determine compliance with licensure requirements. It should be noted, however, that “license” is very broadly defined by A.R.S. § 41-1001(11) to include all types of permission or approval that an individual needs to lawfully conduct particular activities or regulated activity. The requirements of A.R.S. § 41-1009 do not apply to visits and meetings at a regulated person’s premises for a purpose other than inspection. Also exempted from the statute are criminal investigations, undercover investigations, and situations where there is reasonable suspicion that the regulated person may be engaged in criminal activity.

One problem area is an inspection by a state agency that is operating under a delegation of authority to enforce federal law. The application of A.R.S. § 41-1009 must be determined on a case-by-case basis, considering such factors as the delegation agreement, the relevant legal authority, and the possible agency actions that may result from the inspection.

12.3.3.3 Subpoenas. A subpoena compels a person to appear before an agency and answer questions or provide testimony under oath or to produce records. See, e.g., A.R.S. § 32-1451.01(B)(1). The existence and scope of an agency’s subpoena power is determined by the language of the authorizing statutes. Generally speaking, a subpoena is valid as long as the inquiry is for a lawfully authorized purpose, the information sought sufficiently relates to that purpose, and reasonable conditions are imposed on the production of records. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n, 133 Ariz. 500, 506, 652 P.2d 1023, 1029 (1982).

Caveat: Agencies that issue subpoenas for complainants’ or licensees’ confidential health records should be aware of the Federal Health Insurance Portability and Accountability Act (“HIPAA”). HIPAA governs the confidentiality of patients’ medical records and regulates the disclosure of the records. As a general rule, HIPAA does not limit a health regulatory agency’s ability to subpoena a complainant’s confidential medical records. HIPAA, however, may impact an agency’s ability to subpoena the medical records of a licensee who is the subject of an agency investigation. Agencies should consult with their legal counsel before subpoenaing confidential medical records.

If a person fails to comply with a subpoena, the agency, through its counsel, may bring an action to enforce the subpoena in the superior court in the county in which the administrative hearing is held. A.R.S. § 12-2212(B). Additionally, some agencies have authority to take disciplinary action against a licensed person who fails to comply with a subpoena. See, e.g., A.R.S. §§ 32-1201(21)(w), -1401(27)(dd).
12.3.3.4 Agency Ordered Evaluations. Some agencies have statutory authority to order licensees to undergo physical, mental, psychological, or competency evaluations as part of an agency investigation if the licensee’s ability to safely practice is at issue. See, e.g., A.R.S. §§ 32-1207(B)(6), -2081(E).

12.3.4 Immunity. Sometimes a witness refuses to answer questions on the grounds that the answers may be incriminating. 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 that may tend to incriminate him or her in a pending or subsequent criminal proceeding. See A.R.S. §§ 41-1066(A), -1092.10(A). An agency must honor the assertion of this right, but may issue a written order to compel the witness to provide the desired testimony or seek a court order to that effect. A.R.S. §§ 41-1066(B), -1092.10(B). Prior written approval of the Attorney General is required before the agency issues the order compelling the witness to testify. Id.

Entities such as corporations have no Fifth Amendment privilege. See Bellis v. United States, 417 U.S. 85, 89-90 (1974). The agency should confer with its legal counsel if this issue arises.

If the agency or a court issues an order compelling the witness to testify, 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 similar offenses. A.R.S. §§ 41-1066(C), -1092.10(C). Questions about this process should be directed to the agency’s legal counsel.

12.3.5 Drawing Adverse Inferences from the Invocation of the Fifth Amendment Privilege. If a party to a civil or administrative enforcement proceeding refuses to answer a question by invoking the Fifth Amendment privilege, the trier of fact may infer that the answer would have been adverse to the witness’s interests. This inference, together with other probative evidence, may be used to support findings of misconduct by the party. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

12.3.6 Other Sources of Information. In addition to information that can be obtained by the methods described above, agencies should take advantage of information available from other governmental agencies. For example, the Department of Public Safety maintains a criminal history information system from which statutorily-authorized agencies may obtain a person’s criminal record. For a discussion of the restrictions on the use of criminal history information, see Section 9.9.4. The Department of Public Safety also maintains the “public documents project” which is a database containing investigative and licensing information concerning individuals and corporations in this state. The Corporations Division of the Arizona Corporation Commission maintains information concerning corporations that conduct business in Arizona, particularly the names and addresses of officers, directors, and substantial stockholders of corporations and, in many
cases, legal problems those individuals and corporations have had. Some of this information is available at the Commission’s website, www.cc.state.az.us/divisions/corporations. Another source of information is court records of civil or criminal actions.

12.4 Administrative Enforcement. An agency may find it necessary to enforce its statutes in a formal enforcement or disciplinary proceeding. The procedures that an agency must follow to utilize its formal administrative enforcement powers are detailed in Chapter 10. The following describes generally the various methods by which an agency can enforce its laws.

12.4.1 Informal Dispositions. The Administrative Procedure Act authorizes state agencies to informally dispose of any formal enforcement proceeding “by stipulation, agreed settlement, consent order or default.” A.R.S. §§ 41-1061(D), -1092.07(F)(5); Section 10.5.5. Thus, many matters brought to an agency’s attention may be settled informally by the agency and the licensee without initiating a formal enforcement proceeding. This approach is desirable when the issues are relatively simple because it is more efficient and cost effective than a formal hearing. Even when all the allegations contained in the complaint may not be resolved in an informal manner, some issues may be disposed of informally, thereby narrowing the scope of the formal hearing. Agencies, however, can agree to only those settlement terms that they are otherwise statutorily authorized to order.

12.4.1.1 Disposition by Correspondence. One method of resolving a complaint informally is through correspondence. The agency may write to the holder of the license, permit, or certificate (“licensee”), explain the nature of the complaint received, and request a response. The response may explain the situation to the agency’s satisfaction, thereby concluding the matter.

12.4.1.2 Disposition by Informal Meeting. Another method for resolving a complaint informally is for the agency to hold an informal meeting with the licensee. An informal meeting may be held before the agency institutes formal proceedings or after the proceedings have begun. Evidence of conduct or statements made in compromise negotiations is generally not admissible at any subsequent administrative hearing. See Ariz. R. Evid. 408.

12.4.1.3 Disposition by Informal Statutory Proceedings. The statutes governing either particular agencies or administrative appeals generally may provide for formal interviews with a licensee in a contested case or informal settlement conferences with the licensee in appealable agency actions. See, e.g., A.R.S. §§ 32-1451(H), -1551(F), 41-1092.06.

Formal interviews are quasi-judicial proceedings that do not rise to the level of a formal administrative hearing but which may result in disciplinary sanctions against the licensee (short of suspension or revocation). Accordingly, the agency must provide the

Informal settlement conferences are available only in appealable agency actions, not in contested cases. If the appellant in an appealable agency action requests an informal settlement conference, the agency must hold the conference within fifteen days after receiving the request. A.R.S. § 41-1092.06(A).

A person with the authority to act on behalf of the agency must represent the agency at the informal settlement conference. A.R.S. § 41-1092.06(B). The parties participating in the conference waive their right to object to the participation of the agency representative in the final administrative decision. Id. Statements made by the appellant at informal settlement conferences, including documents created solely for the purpose of settlement negotiations, are inadmissible in any subsequent administrative hearing. A.R.S. § 41-1092.06(B).

12.4.2 Consent Orders. A consent order represents a compromise between the agency and licensee in which each gives up its right to litigate the alleged violation at an administrative hearing. The consent order generally involves a licensee’s consent to some form of disciplinary or corrective action and may include the payment of civil penalties, investigative costs, or restitution. See, e.g., A.R.S. §§ 32-1451(F); 32-2153.01; A.A.C. R4-1-114(A)(3). The consent order must be in writing and signed by the licensee or other affected party.

Consent orders must recite findings of fact and conclusions of law to which the parties agree. A.R.S. § 41-1063; A.R.S. § 41-1092.07(F)(7). This ensures that questions will not subsequently arise concerning either the licensee’s culpability or the reasons for the issuance of the consent order. Some agencies have specific rules that prohibit an agency from issuing consent orders imposing sanctions if the licensee denies the alleged conduct. See, e.g., A.A.C. R20-4-1220(A). Some agencies have promulgated rules requiring that certain provisions be included in any consent order issued. See, e.g., A.A.C. R4-1-114(A)(3). Consent orders are generally considered to be public records, unless specifically made confidential by statute.

12.4.3 Sanctions Available in Disciplinary Actions. Chapter 10 describes the adjudicatory process for determining whether a violation of the agency’s regulatory statutes or rules has occurred. Once such a determination has been made, the agency may impose those sanctions authorized by its governing statutes. Sections 12.4.3.1 to 12.4.3.9 describe sanctions typically available to agencies. See also Section 9.5.

12.4.3.1 Revocation or Suspension. An agency may issue an order to revoke or suspend a license as a sanction in a disciplinary action if that agency is authorized by statute to do so. See, e.g., A.R.S. § 32-742(A), (B); A.R.S. § 32-924(G); A.R.S. §§ 32-1366, -1367; A.R.S. § 32-2153. The agency must provide the licensee with notice and an
opportunity for a hearing before suspending or revoking his or her license unless the agency determines that emergency action is required. A.R.S. §§ 41-1064(C), -1092.11(B); see also Section 12.4.3.2 (Summary Suspension).

12.4.3.2 Summary Suspension. The Administrative Procedure Act provides that a state agency may summarily suspend a license if an agency finds that the public health, safety, or welfare requires such emergency action. A.R.S. §§ 41-1064(C), -1092.11(B). In addition, an agency should consult its own governing statutes to determine if there is an agency-specific summary suspension statute. See, e.g., A.R.S. § 32-1451(D); A.R.S. § 32-2157(B). Because the suspension of a license or permit without notice and a hearing may implicate the licensee’s due process rights, an agency should impose summary suspension only if a genuine emergency exists and the post-suspension hearing process must be “promptly instituted and determined.” A.R.S. §§ 41-1064(C), -1092.11(B); see also Dahnad v. Buttrick, 201 Ariz. 394, 399 ¶ 18, 36 P.3d 742, 747 (App. 2001). For a more detailed discussion of summary suspension procedures, see Section 10.5.1.2.

12.4.3.3 Denial of Renewal. Agencies are typically authorized to deny renewal of a license. See, e.g., A.R.S. § 32-2153. The licensee has a right to request a hearing on the order denying renewal. A.R.S. § 41-1092.03(B). The licensee must request the hearing within the time specified. Id. § (A). If the licensee submits a timely and sufficient application for renewal, the existing license does not expire until the time in which the licensee has the right to request a hearing has expired or a later date fixed by order of the reviewing court. A.R.S. §§ 41-1064(B), -1092.11(A).

12.4.3.4 Probation. One of the disciplinary options available to some state agencies is placing licensees on probation. The main purpose of imposing probation is to rehabilitate the licensee. See, e.g., A.R.S. §§ 32-128(A), -1744(C)(2). Probation may be for a fixed term or may be tied to the completion of certain requirements. The requirements may be tailored to address specific concerns relating to the licensee, such as requiring continuing or remedial education, or supervision. Many agencies may also impose restitution as a condition of probation (see, e.g., A.R.S. §32-352(4)), unless that action would be prohibited because, for example, the licensee’s “debt” has been discharged through bankruptcy.

Agencies should be as specific as possible in creating the terms and conditions of probation and may consider requiring the licensee to appear regularly before the regulatory board or requiring periodic audits for the purpose of monitoring the licensee’s progress with the probationary order. Orders of probation should also contain the written warning that failure to comply with the terms and conditions of probation may lead to more serious disciplinary action.

12.4.3.5 Cease and Desist Orders. Some agencies have been granted statutory authority to issue cease and desist orders. See, e.g., A.R.S. §§ 32-1369(A)(1), -3284. A cease and desist order is similar to an injunction and may be used to order persons to
cease activities that violate the law and, in some cases, to take remedial steps to correct the consequences of past violations.

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 the act or acts to be restrained. The order should not merely refer to the complaint, notice of hearing, or other document, but should fully describe the violations. After identifying the persons restrained under the order, the agency should add, if applicable, the following language: “and their officers, agents, servants, employees, attorneys, successors and assigns, and all persons in active concert or participation with them.”

An agency may not issue cease and desist orders unless there is an express grant of statutory authority. 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 following the appropriate statutory provisions and regulations governing the agency’s disciplinary proceedings. See Merrick v. Rottman, 135 Ariz. 594, 597, 663 P.2d 586, 589 (App. 1983). In Merrick, 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 certain advertising practices that the board alleged were deceptive. 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. Id. The court noted that the board’s order was a formal act directed against the licensee and constituted an unlawful ex parte injunction. Id. at 599, 663 P.2d at 591. The court also held that, given the specific enforcement powers granted to the board under the Funeral Directors and Embalmers Act, no additional power could be implied. Id.

12.4.3.6 Administrative and Civil Penalties. Some administrative agencies are authorized to impose civil penalties for violations of their regulatory laws. See, e.g., A.R.S. §§ 32-924(F)(7), -1263.01(A)(5). An agency may not impose such penalties, however, absent statutory authority.

12.4.3.7 Censure. Agencies may censure licensees who violate regulatory statutes or rules if the agency’s statutes authorize them to do so. See, e.g., A.R.S. § 32-1263.01(A)(3). The decree of censure may require the licensee to pay restitution to the aggrieved party. Id.; see also A.R.S. § 32-1693(B)(2).

12.4.3.8 Non-disciplinary Sanctions. Some agencies are statutorily authorized to order non-disciplinary sanctions. Examples of non-disciplinary sanctions include letters of concern or advisory letters and non-disciplinary continuing education. See, e.g., A.R.S. §§ 32-128(B), -1451(I), -1855(D).
12.4.3.9 Restricted or Conditional Licenses. The legislature has provided authority to some agencies to issue provisional or conditional licenses. See A.R.S. §§ 8-505, 28-4364, 32-1027, 32-2153, 36-425, 36-593, 36-882, 41-2176. Courts have recognized that the powers of administrative agencies are strictly limited by the statutes creating them; accordingly, agencies without statutory authority to issue restricted or conditional licenses may not do so. Boyce v. City of Scottsdale, 157 Ariz. 265, 267, 756 P.2d 934, 936 (App. 1988).

12.5 Civil Enforcement.

12.5.1 Injunctive Actions. 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. See, e.g., A.R.S. §§ 32-1666.01; -1995.

12.6 Criminal Enforcement. Violations of licensing requirements are often also classified as criminal violations. See, e.g., A.R.S. § 32-747(E); A.R.S. § 32-1268(A); A.R.S. § 32-1996; A.R.S. § 32-2238(A); and A.R.S. § 32-3286. Moreover, during an agency’s regulatory activity, the agency may uncover evidence of conduct that violates general criminal statutes, such as those relating to bribery, embezzlement, schemes to defraud, and falsification of records. See Chapter 14. Agencies that identify such criminal conduct should immediately notify the Attorney General’s Office.

If a person or enterprise is convicted of any felony, the court may order the forfeiture, suspension, or revocation of any charter, license, permit, or prior approval granted to such person or enterprise by any department or agency of the state. A.R.S. § 13-603(G). Agencies should contact the Attorney General’s Office for assistance in coordinating with the appropriate county attorney’s office prior to sentencing.

12.7 Double Jeopardy. The double jeopardy clause of the Fifth Amendment to the United State Constitution does not prevent the revocation of a professional license for conduct that also gives rise to a criminal conviction. Rondberg v. Ariz. Bd. of Chiropractic Exam’rs, 182 Ariz. 409, 412, 897 P.2d 711, 714 (App. 1995); Schillerstrom v. State, 180 Ariz. 468, 470, 885 P.2d 156, 158 (App. 1994). Administrative proceedings generally are not considered prosecutions for purposes of the double jeopardy clause. Mullet v. Miller, 168 Ariz. 594, 596, 816 P.2d 251, 253 (App. 1991). A prosecution for double jeopardy purposes is a judicial proceeding in which the State seeks to convict and punish persons alleged to have committed a criminal offense. State v. Nichols, 169 Ariz. 409, 411, 819 P.2d 995, 997 (App. 1991). The primary purpose of an administrative license disciplinary proceeding, on the other hand, is to ascertain the moral fitness and professional competency of the licensee and to determine whether the licensee should be disciplined to protect the public. Schillerstrom, 180 Ariz. at 471.
Fines imposed administratively or in other civil proceedings generally are not considered to be criminal punishment; accordingly, double jeopardy principles do not necessarily prohibit a criminal prosecution after the imposition of civil penalties for the same conduct. *See Hudson v. United States*, 522 U.S. 93, 98-105 (1997). Despite the legislature’s intent to create a civil penalty, however, a nominally civil penalty may be treated as a criminal penalty if it is so “punitive in purpose or effect” that it cannot be considered civil. *See, e.g., Martin v. Reinstein*, 195 Ariz. 293, 303, 987 P.2d 779, 789 (App. 1999). Where the conduct in question might be subject to both civil and criminal penalties, agency enforcement counsel and the relevant prosecutorial authority should consult to ensure that double jeopardy issues are considered before enforcement action is taken.

12.8 Jurisdiction on Indian Reservations. Whether a state agency has jurisdiction to regulate persons or activities on Indian reservations is often a very complex issue and there is no definitive answer that applies to all situations. In general, a state agency has regulatory authority over its own licensees on Indian land. Because of federal policy favoring Indian self-governance, a state agency does not have regulatory authority over non-licensed persons providing services to tribal members on a Indian reservation. Whether a state agency has authority over services provided to non-tribal members on tribal land by unlicensed non-tribal members depends on the facts presented. Agencies should consult with their legal counsel regarding questions of jurisdiction on Indian reservations.
CHAPTER 13
LITIGATION AGAINST STATE ENTITIES OR EMPLOYEES

Table of Contents

Section 13.1  Scope of this Chapter

Section 13.2  Procedure for Receiving Service of a Notice of Claim, Summons and Complaint, or Subpoena

13.2.1  Service of a Notice of Claim

13.2.2  Service of a State Court Summons and Complaint

13.2.2.1  Personal Service of Summons and Complaint upon the State

13.2.2.2  Personal Service of Summons and Complaint upon a State Agency, Board, Commission, or Department

13.2.2.3  Personal Service of Summons and Complaint upon an Individual

13.2.3  Waiver of Service

13.2.3.1  Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service upon the State

13.2.3.2  Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service upon a State Agency, Board, Commission, or Department

13.2.3.3  Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service upon Individuals

13.2.3.4  Receipt by Agency of a Notice and Request for Waiver of Service upon the State

13.2.3.5  Receipt by Agency of a Notice and Request for Waiver of Service upon the Agency

13.2.3.6  Receipt by Individual of a Notice and Request for Waiver of Service upon the Individual

13.2.4  Service of a Summons and Complaint in Federal Court
13.2.5  Service of Subpoenas
  13.2.5.1  Service requirements
  13.2.5.2  Receipt by Attorney General's Office of Subpoenas
  13.2.5.3  Receipt by State Entities or Employees of Subpoenas

Section 13.3  Liability and Immunities of State Entities and Employees
  13.3.1  Liability Based on State Law
  13.3.2  Liability Based on Federal Law
  13.3.2.1  Section 1983 Liability
  13.3.3  Immunity Based on State Law
    13.3.3.1  Absolute Immunity
    13.3.3.2  Qualified Immunity
    13.3.3.2.1  Statutory Qualified Immunity
    13.3.3.2.2  Common-Law Qualified Immunity
  13.3.4  Immunity Based on Federal Law
    13.3.4.1  Eleventh Amendment Immunity
    13.3.4.2  Absolute Immunity
    13.3.4.3  Qualified Immunity
    13.3.4.4  State Action Immunity Under the Antitrust Laws

Section 13.4  Insurance
  13.4.1  Indemnification of State Employees
  13.4.2  Course of Employment
  13.4.3  Extent of Coverage
  13.4.4  Automobile Coverage

Revised 2011
13.4.5 Punitive Damages

13.4.6 Property Coverage

13.4.7 Acts Excluded from Coverage

13.4.7.1 Acts Constituting Felonies

13.4.7.2 Acts Outside the Course and Scope of Employment or Authorization

Section 13.5 Procedures for Tort Claims

13.5.1 Mandatory Presentation of the Notice of Claim

13.5.1.1 Contents of the Notice of Claim

13.5.1.2 Service of the Notice of Claim

13.5.1.3 Time for Filing the Notice of Claim

13.5.1.3.1 Legal Disability

13.5.1.4 Disallowance of Claim

13.5.1.5 Federal Constitutional Claims

13.5.2 Lawsuits Involving Tort Claims

13.5.2.1 Time for Filing the Lawsuit

13.5.2.1.1 Tolling

13.5.2.2 Jurisdiction and Venue

13.5.2.3 Defendants

13.5.2.4 Pleadings and Service of Process

13.5.2.5 Judgment, Punitive Damages, Interest, Costs, and Attorney fees

13.5.2.6 Satisfaction of Judgment

13.5.3 Settlements

Revised 2011
Section 13.6  Procedures for Contract Claims

13.6.1  Applicability of Procurement Code

13.6.2  Procedures for Making Contract Claims

13.6.2.1  Procedures Under Title 35

13.6.3.2  Dispute-Resolving Procedures of the Procurement Code

13.6.3  Judicial Review of Decisions of the Director of DOA in Contract Claims Disputes

13.6.4  Contract Claims Not Covered by the Procurement Code

13.6.5  Applicability of Procurement Code Procedures to Tort Claims Related to Contracts

13.6.6  Attorney fees
CHAPTER 13

LITIGATION AGAINST STATE ENTITIES AND EMPLOYEES

13.1 Scope of This Chapter. This Chapter discusses several topics related to lawsuits filed against the State or its agencies, departments, boards, or commissions (“state entities”) or against state officers or employees (“state employees”). The topics addressed are: (1) the procedures for service of a summons and complaint, notice of claim, or subpoena; (2) the liability and immunity of state entities or employees under certain state or federal laws; (3) the State’s self-insurance program; (4) the procedures for tort claims against state entities or employees; and (5) the procedures for contract claims against the state entities. This handbook does not address issues related to workers’ compensation and employers’ liability insurance. Discrimination law is discussed in Chapter 15.

Any state entity or employee faced with threatened or actual litigation should immediately consult with legal counsel. Section 1.9 discusses the Attorney General’s Guidelines for representing state entities and employees.

13.2 Procedure for Receiving Service of a Notice of Claim, Summons and Complaint, or Subpoena. State entities and employees may be named as defendants or subpoenaed to produce documents or testimony in both federal and state courts. These court processes, however, cannot be pursued or enforced without proper service of the appropriate documents. State agencies and employees should recognize three types of documents that may be served in connection with court proceedings.

The Notice of Claim — Before certain lawsuits may be filed and pursued against a state entity or employee (civil suits for money damages for claims arising under state law), the claimant must file a notice of claim on the state entity or employee. See Section 13.5.

The Summons and Complaint — To initiate a lawsuit, the person making the claim must serve formal court documents upon each of the named defendants. The summons is a writ endorsed by the clerk of the court requiring the served party to appear and defend. The complaint is a formal pleading containing the claims made.

The Subpoena — A subpoena is used to require someone to appear and testify or to produce documents relevant to a pending case. Although the subpoena must conform to specific requirements set forth in the rules, it need not be endorsed by the clerk.

To ensure proper notice, specific rules direct how these documents must be served. Improper service may affect time deadlines or even the legality of certain proceedings. A state officer or employee on whom service of any legal documents is made should immediately contact legal counsel for advice on how to proceed.
13.2.1 Service of a Notice of Claim. Before a claimant may sue for money damages against a state entity or state employee for claims arising under state law, the claimant must file a notice of claim on the entity or person to be named as a defendant in the suit. A.R.S. § 12-821.01.

For a complete discussion of the claim statute, see Section 13.5. Filing the notice of claim is accomplished by actually delivering it to the “person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona Rules of Civil Procedure.” A.R.S. § 12-821.01(A); see Lee v. State, 218 Ariz. 235, 239, ¶ 19, 182 P.3d 1169, 1173 (2008). These service rules are discussed in sections 13.2.2 to 13.2.3.6.

If a notice of claim—which is often in the form of a letter—is filed on any state official or employee, the person should immediately contact the Department of Administration, Risk Management Division, in Phoenix, Arizona, to arrange delivery of the documents for proper investigation and processing. The person should also contact the Liability Management Section of the Attorney General’s Office.

13.2.2 Service of a State-Court Summons and Complaint. If service of a lawsuit is attempted or accomplished, it is important to notify the Attorney General’s Office immediately. The rules of procedure generally allow only twenty days after formal service before a response of some type must be filed. Ariz. R. Civ. P. 12(a). Any delay in contacting counsel may reduce the time available to investigate the case and prepare a proper response. This could lead to drastic consequences, such as the entry of a default judgment against the state entity or employee.

Normally, it is sufficient to notify the attorney assigned to represent the state entity involved. If the lawsuit involves a request for money damages, the Liability Management Section of the Attorney General’s Office should also be notified immediately. If the documents served involve state-related activities, the Attorney General’s Office should be contacted even if a state employee is named in his or her individual—or personal—capacity, as opposed to his or her official capacity. The Attorney General’s Office will then determine whether to provide representation to the employee pursuant to A.R.S. § 41-621. See, Sections 13.4.3 and 13.4.7.

13.2.2.1 Personal Service of Summons and Complaint on the State. Personal service on the State can be accomplished only by delivering the proper documents to the Attorney General. Ariz. R. Civ. P. 4.1(h). Any person attempting personal service of a summons and complaint on the State must be directed to the receptionist at the main entrance to the Department of Law Building at 1275 West Washington Street in Phoenix or to the receptionist at the South Building at 400 West Congress, Suite 315, in Tucson. These are the only locations authorized to receive personal service of process. The Department of Law receptionists are authorized only to receive (not accept) service of process for the State of Arizona.
13.2.2.2 Personal Service of Summons and Complaint upon a State Agency, Board, Commission, or Department. Personal service on any other state entity can be accomplished by delivering the proper documents to “the person, officer, group or body [or a member of the group or body] responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity.” Ariz. R. Civ. P. 4.1(j). Any officer or employee accepting service of documents should immediately notify the state entity’s legal counsel.

The Department of Law receptionists are authorized to receive service for agencies that are represented by the Attorney General’s Office unless the appeal of an administrative decision is involved. In an action to review an administrative decision, the Administrative Review Act, A.R.S. §§ 12-901 to -914, requires that service of the summons and complaint be made “as provided by the rules of civil procedure, upon the agency at its principal office.” A.R.S. § 12-906 (emphasis added). If an attempt is made to serve the Attorney General with a suit under the Administrative Review Act, the Department of Law receptionist should refer the process server to the agency’s main office.

Some agencies require service to be accomplished by delivering the necessary documents to a specified officer or employee. See, e.g., A.A.C. R19-1-106 (requiring that complaints for administrative review be served on the Director of the Department of Liquor).

In suits against state entities, a courtesy copy of the summons and complaint is also often served on the Attorney General. The Department of Law receptionist is authorized only to receive (not accept) service of process of such courtesy copies.

13.2.2.3 Personal Service of Summons and Complaint on an Individual. Personal service on individual state officers or employees can be accomplished only by one of three methods: (1) by delivering the necessary documents to the named individual; (2) by leaving the documents at the individual’s home with a person who both lives there and is of suitable age and discretion; or (3) by delivering them to an agent whom the individual has authorized to receive them. Ariz. R. Civ. P. 4.1(d). Service is not accomplished merely by leaving the documents at the individual’s workplace. Moreover, the policy of the Attorney General’s Office is that its employees may not authorize the receptionist or any Attorney General employee to receive service of process at the Department of Law on their behalf.

If the State or a state agency is sued together with a state officer or employee, the Department of Law’s receptionist may receive the summons and complaint only for the State or state agency. The receptionist cannot receive service for any named individuals and therefore should direct the process server to serve the individual in accordance with Arizona Rule of Civil Procedure 4.1(d).
In suits against a state officer or employee, a courtesy copy of the summons and complaint is also often served upon the Attorney General. The Department of Law receptionist is authorized to receive (not accept) service of process of the courtesy copies.

**13.2.3 Waiver of Service.** The State and individual state officers or employees may (and normally should) waive personal service of process if the plaintiff makes a proper request under Arizona Rule of Civil Procedure 4.1(c). Although this rule does not explicitly provide for waiver of service by other state entities, such as agencies, they too may choose to waive personal service if requested by the plaintiff.

Under Arizona Rule of Civil Procedure 4.1(c), a plaintiff must deliver, by mail or otherwise, a notice and request for waiver of service by the defendant. There are several requirements for the notice and request, including the following:

A. The request must be in writing and addressed directly to the defendant;

B. The request must be sent through first class mail or other reliable means;

C. The request must include a copy of the complaint and identify the court in which it has been filed;

D. The request must inform the defendant of the consequences of compliance and the failure to comply;

E. The request must set forth the date the request was sent;

F. The request must allow a reasonable time to return the waiver, which must be at least thirty days from the date the request was sent; and

G. The request must include an extra copy of the notice and request and a prepaid means of compliance (e.g., a self-addressed stamped envelope).

If a defendant refuses without good cause to comply with a request to waive service, thereby forcing the plaintiff to personally serve the summons and complaint, the court will impose on the defendant the costs of formal service. If service is waived, the defendant’s deadline for responding to the suit is sixty days after the request for waiver was sent. The Attorney General’s Office generally encourages waiver of service upon proper request.

**13.2.3.1 Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service upon the State.** Any employee in the Phoenix office of the Attorney General who receives a summons and complaint by mail under the waiver provisions of Arizona Rule of Civil Procedure 4.1(c) shall immediately forward all documents, including the return envelope, to the Administration Division receptionist in the northeast corner of
the second floor of the Department of Law Building at 1275 West Washington Street. Any employee in the Tucson office must immediately forward the documents to the receptionist in the lobby at the main entrance to the South Building at 400 West Congress Street, Suite 315. These are the only locations authorized to receive alternative service of process by mail.

13.2.3.2 Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service on a State Agency, Board, Commission, or Department. State agencies and other state entities may choose to waive service, even though those entities are not subject to the waiver provisions of Arizona Rule of Civil Procedure 4(c). Those state entities (other than the State itself) may authorize their legal counsel to waive service. If an agency or other state entity has done so, the assistant attorney general assigned to represent the entity may accept service by mail on its behalf.

If a state entity chooses not to waive service, any employee of the Attorney General’s Office who receives documents requesting waiver of service of process that is intended to be served on that agency should return the entire packet to the sender. Do not fill out the form for waiver of service of process. The employee should also include an accompanying letter, such as the following:

You have attempted to request a waiver of service of process by an agency, board, commission, or department (agency) of the State of Arizona by mailing documents to this office. The waiver rules do not apply to agencies, and we have not been authorized to waive service by mail for that agency. See Ariz. R. Civ. P. 4.1(c). The documents must be personally served on “the person, officer, group or body [or a member of the group or body] responsible for the administration of that entity or by serving the appropriate legal officer, if any.” Ariz. R. Civ. P. 4.1(j).

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

13.2.3.3 Receipt by Attorney General’s Office of a Notice and Request for Waiver of Service on Individuals. The Department of Law may not waive service of process for any state officer or employee unless specifically authorized to do so.

If any employee of the Attorney General’s Office receives a summons and complaint and a form for waiver of service of process that is intended to be served on an individual who is a state officer or employee other than the employee receiving the summons and complaint, and authorization to receive service has not been granted, the employee should return the entire packet to the sender. Do not fill out the form for waiver of service of process. The employee should also include an accompanying letter, such as the following:
You have attempted to request a waiver of service of process by an officer or employee of the State of Arizona by mailing documents to this office. The documents must be provided to the individual named in the summons. See Ariz. R. Civ. P. 4.1(c)(2).

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

### 13.2.3.4 Receipt by Agency of a Notice and Request for Waiver of Service upon the State.

Because the Attorney General is the officer who must be served on behalf of the State, agencies and agency personnel must not sign and return mailed documents that are to be served on the State in the manner that could constitute a waiver of service.

If any agency receives by mail a summons and complaint and a notice and request for waiver of service of process that is intended to be served upon the State, it should return the entire packet to the sender. Do not fill out the form for waiver of service of process. The agency should also include an accompanying letter, such as the following:

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

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 W. Washington
- Phoenix, Arizona 85007

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

### 13.2.3.5 Receipt by Agency of a Notice and Request for Waiver of Service upon the Agency.

The Arizona Rules of Civil Procedure do not provide for waiver of service by state agencies. Ariz. R. Civ. P. 4.1(c)(2). However, an agency may choose to accept such service. Additionally, an agency may authorize its legal counsel to accept service by mail on its behalf.

If an agency receives a notice and request for waiver of service and chooses to waive service, it should immediately forward all documents received to the Attorney General, with a letter indicating the decision to waive service. Do not fill out the form for waiver of service before forwarding the documents to the Attorney General.
If an agency chooses not to waive service, any agency officer or employee who receives a summons and complaint and a form for waiver of service of process that is intended to be served on that agency should return the entire packet to the sender. Do not fill out the form for waiver of service of process. The agency officer or employee should also include an accompanying letter, such as the following:

You have attempted to request a waiver of service of process on this agency, board, commission, or department (agency) of the State of Arizona by mailing documents to this office. The Arizona Rules of Civil Procedure do not call for such a waiver, and the agency has not otherwise authorized waiver of service by mail.

The documents must be personally served on “the person, officer, group or body [or a member of the group or body] responsible for the administration of that entity or by serving the appropriate legal officer, if any.” Ariz. R. Civ. P. 4.1(j); see also Ariz. R. Civ. P. 4.1(c)(2).

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

13.2.3.6 Receipt by a State Employee of a Notice and Request for Waiver of Service upon the Employee. If any individual receives a notice and request for waiver of service together with a copy of a summons and complaint making claims related to his or her service for the State, the individual should immediately forward all documents received to the Attorney General, with a letter authorizing waiver of service. Do not fill out the form for waiver of service before forwarding the documents to the Attorney General. Do not return any of the documents to the sender before discussing the matter with counsel appointed to the case by the Attorney General.

13.2.4 Service of a Federal-Court Summons and Complaint. The rules concerning service of process for federal lawsuits are essentially the same as those used for state court. One significant difference is that suits against the State may be served either upon its “chief executive officer”—the Governor—or in the manner prescribed by state law. Fed. R. Civ. P. 4(j)(2).

The federal rules do not provide for waiver of service by the State or other governmental organizations subject to suit. See Fed. R. Civ. P. 4(d). The State may choose to waive service, but any failure to do so will not subject it to payment of costs for formal service.
13.2.5 Service of Subpoenas.

13.2.5.1 Service requirements. Service of subpoenas in civil actions in state court is governed by Arizona Rule of Civil Procedure 45, and service of subpoenas in criminal actions is governed by Arizona Rule of Criminal Procedure 34. In federal court the applicable rules are Federal Rule of Civil Procedure 45 and Federal Rule of Criminal Procedure 17. The document should: identify the court involved and the case number and caption; specify whether it requires testimony or the production of documents or things; and include specific information concerning the rights of the recipient.

Service may be accomplished by delivering a copy of the subpoena to the person named. If the subpoena requests the person’s attendance, the requesting party must also tender one day’s attendance fees and mileage as required by law. (In state court, the fee requirement does not apply if the requesting party is the State or an officer or employee thereof. In federal court, the fee requirement does not apply if the requesting party is the United States or an officer or agency thereof.) The rules imply that personal service is required, but it is common practice for attorneys to deliver subpoenas by mail, especially if they are requesting only the production of documents or things or the ability to inspect property.

13.2.5.2 Receipt by Attorney General’s Office of Subpoenas. If the subpoena names the “custodian of records for the Attorney General’s Office,” the receptionist is authorized to receive it. Otherwise, the receptionists in the Phoenix and Tucson offices have no authority to accept or receive subpoenas for any state entity or employee. The receptionist should advise the person attempting to serve the subpoena to serve it personally upon the individual or agency named in the subpoena.

13.2.5.3 Receipt by State Entities or Employees of Subpoenas. Any state entity or employee that receives a subpoena should immediately contact legal counsel to obtain advice regarding the response. Time is critical because objections to the subpoena generally must be made by the earlier of the compliance date specified in the subpoena or 14 days from service.

13.3. Liability and Immunities of State Entities and Employees.

13.3.1 Liability Based on State Law. Almost any act or failure to act by a state officer or employee can become the basis for a lawsuit. Many suits against the State and state employees are based on the state’s common law of negligence. Negligence is the failure to act as a reasonably prudent person would act in similar circumstances. Other possible state-law claims include gross negligence, battery, and defamation.
As a general rule, a suit based solely on negligent acts must be brought in state court. The claimant may name as a defendant the State, other state entities, such as a state agency, or individual state employees.

13.3.2 Liability Based on Federal Law. A claimant may also sue for the violation of federal rights. Suits based on federal rights may be brought in state court or federal court, subject to sovereign immunity or Eleventh Amendment defenses.¹ See Section 13.3.2.1; see also Chapter 15 (discussing discrimination law).

13.3.2.1 Section 1983 Liability. Federal lawsuits against state defendants most commonly are based on 42 U.S.C. § 1983, which allows suits alleging that wrongful conduct by a state employee deprived the plaintiff of his or her federal constitutional or statutory rights. A § 1983 suit for damages must be brought against the particular state employee who is alleged to have violated the plaintiff’s civil rights; neither the state nor its agencies, boards, or commissions, may be sued for damages under § 1983. Will v. Mich. Dept of State Police, 491 U.S. 58 (1989). A § 1983 claim for damages must also be brought against the employee in his individual capacity and not his official capacity. Hafer v. Melo, 502 U.S. 21, 24 (1991). Although the plaintiff sues the state employee personally, the State provides liability coverage for the employee if he or she was acting within the course and scope of his employment or authorization. A.R.S. § 41-621. (See section 13.4.)

13.3.3 State-Law Immunities.

13.3.3.1 Absolute Immunity. In claims based on state law, if the State or a state employee has absolute immunity for a particular type of conduct, the claims must be dismissed, even if the conduct is alleged to have been outrageous or malicious. See A.R.S. § 12-820.01.

The State and state employees have absolute immunity for “[t]he exercise of a judicial or legislative function” and “[t]he exercise of an administrative function involving the determination of fundamental governmental policy.” A.R.S. § 12-820.01(A). The Legislature has defined “the determination of fundamental governmental policy” as follows:

The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

¹ In Alden v. Maine, 527 U.S. 706, 712 (1999), the U.S. Supreme Court held that Congress may not “subject nonconsenting States to private suits for damages in state courts.”
1. A determination of whether to seek or whether to provide the resources necessary for any of the following: (a) [t]he purchase of equipment, (b) [t]he construction or maintenance of facilities, (c) [t]he hiring of personnel, or (d) [t]he 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.

4. The establishment, implementation and enforcement of minimum safety standards for light rail transit systems.

A.R.S. § 12-820.01(B). The defense applies only to actual decisions or affirmative acts: it does not cover failures to make a decision or decision made by default. Galati v. Lake Havasu City, 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996); Goss v. City of Globe, 180 Ariz. 229, 231, 883 P.2d 466, 468 (App. 1994).

13.3.3.2 Qualified Immunity.

13.3.3.2.1 Statutory Qualified Immunity. If the State or a state employee has statutory qualified immunity for a particular type of conduct, the plaintiff cannot recover absent proof that the defendant was grossly negligent or intended to cause injury. A.R.S. § 12-820.02. The Legislature has granted qualified immunity for the following:

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 or a youth committed to the department of juvenile corrections.

3. An injury resulting from the probation, community supervision or discharge of a prisoner or a youth committed to the department of juvenile corrections, from the terms and conditions of the prisoner’s or youth’s probation or community supervision or from the revocation of the prisoner’s or youth’s probation,
community supervision or conditional release under the psychiatric security review board.

4. An injury caused by a prisoner to any other prisoner or an injury caused by a youth committed to the department of juvenile corrections to any other committed youth.

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 A.R.S. § 12-820.01.

6. The failure to discover violations of any provision of law when inspections are done of property other than property owned by the public entity in question.

7. An injury to the driver of a motor vehicle that is attributable to the violation by the driver of A.R.S. §§ 28-693, 28-1381 or 28-1382 [reckless driving, driving under the influence (“DUI”), or extreme DUI].

8. The failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under any federal law or any law of this state.

9. Preventing the sale or transfer of a handgun to a person who may lawfully receive or possess a handgun.

10. The failure to detain a juvenile taken into temporary custody or arrested for a criminal offense or delinquent or incorrigible act in the appropriate detention facility, jail or lockup described in § 8-305.

A.R.S. § 12-820.02(A).

Qualified immunity may also be found in other statutes applicable to specific agencies. For example, A.R.S. §§ 9-500.02 and 48-818 provide qualified immunity to “a property owner, its officers or employees or a tenant . . . when rendering emergency medical aid provided by [certain specified persons].” If the specified persons render emergency aid on State-owned or -leased property, the State has qualified immunity.
In addition, public entities and employees have an affirmative defense, in the nature of qualified immunity, from liability for injuries arising out of a plan or design for the maintenance or operation of highways, roads, streets, bridges or rights-of-way that were “prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design.” A.R.S. § 12-820.03. This defense does not apply, however, if the public entity or employee fails to adequately warn the public of any unreasonably dangerous hazards. Id.

The State and its political subdivisions are similarly immune from liability for actions and inaction while “engaging in emergency management activities or performing emergency functions” in carrying out the orders of the Governor in a declared emergency. A.R.S. § 26-314(A). This immunity does not apply to wilful misconduct, gross negligence, or bad faith. Id.

Public entities and public employees acting within the scope of their employment are also protected from liability for punitive or exemplary damages. A.R.S. § 12-820.04. See Section 13.4.5. Furthermore, “[a] public entity is not liable for losses that arise out of . . . an act . . . 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.” A.R.S. § 12-820.05(B). This subsection does not apply to “acts arising out of the use of a motor vehicle.” Id. (The State is not required to insure against employees’ felonious acts, nor must it indemnify employees for their felonious acts. A.R.S. § 41-621(L)(1)).

Individual state employees have certain immunities from personal liability as well. For example, if a statute under which a state officer, agent, or employee was acting in good faith, and without wanton disregard of his or her statutory duties, is later declared to be unconstitutional, invalid or inapplicable, the officer, agent, or employee is not personally liable for injury or damage resulting from the statute’s unconstitutionality, invalidity, or inapplicability. A.R.S. § 41-621(I). Likewise, state officers, agents, and employees are not personally liable for injury or damage resulting from their official discretionary acts “if the exercise of the discretion was done in good faith and without wanton disregard of his [or her] statutory duties.” A.R.S. § 41-621(J).

Immunities like those contained in A.R.S. §§ 12-820.01 to -820.05 apply only to suits for money damages, not to suits for injunctive, declaratory, or other equitable relief. Zeigler v. Kirschner, 162 Ariz. 77, 84, 781 P.2d 54, 61 (App. 1989).

13.3.3.1.2 Common-Law Qualified Immunity.

Arizona courts also recognize qualified immunity against claims arising under the common law. See, e.g., Chamberlain v. Mathis, 151 Ariz. 551, 558, 729 P.2d 905, 912 (1986) (holding that agency director had qualified immunity against defamation suit filed by agency employees); Goddard v. Fields, 214 Ariz. 175, 150 P.3d 262 (App. 2007)
recognizing that the Attorney General had qualified immunity against defamation claim arising from announcement of filing a civil-enforcement action against the plaintiff). The supreme court specifically stated that qualified immunity applies to all torts alleged against state officials, whether based on alleged violations of statutory or constitutional law or common-law causes of action. 

Chamberlain, 151 Ariz. at 560, 729 P.2d at 914. To overcome the immunity, the plaintiff must establish objective malice on the part of the public official. Id. at 559, 729 P.2d at 913. That means that the official is protected “if the facts establish that a reasonable person, with the information available to the official, ‘could have formed a reasonable belief that the defamatory statement in question was true and that the publication was an appropriate means for serving the interests which justified the privilege.’” Id.

13.3.4 Immunity Based on Federal Law.


Under its Fourteenth Amendment power, Congress has validly abrogated Eleventh Amendment immunity, for example, for violations of Title VII of the 1964 Civil Rights Act, where it authorized awards of money damages and attorney fees against the states for employment discrimination on the basis of race, color, religion, sex, or national origin. Fitzpatrick, 427 U.S. at 456, 96 S. Ct. at 2671. It also properly subjected States to damages suits under Title II of the Americans with Disabilities Act, which prohibits

But the Supreme Court has struck down other Congressional efforts to abrogate Eleventh Amendment immunity. It held that the Religious Freedom Restoration Act of 1993 did not validly authorize damages suits against the states, both because there was very little evidence of a widespread problem and because the Act was a disproportionate response to the perceived problem. *City of Boerne v Flores*, 521 U.S. at 532. It reached a similar conclusion regarding the Age Discrimination in Employment Act, holding that it was a disproportionate response to the perceived constitutional violations. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86, 120 S. Ct. 631, 647 (2000). It struck down a provision in Title I of the Americans with Disabilities Act—which prohibits discrimination against the disabled in employment—that attempted to hold the States liable for damages. *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

Congress may also require states to waive their Eleventh Amendment immunity as a condition of receiving certain grants of federal funds. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Congress did so, for example, in the Rehabilitation Act, which prohibits discrimination in employment on the basis of a person’s physical disability. *Douglas v. Cal. Dep’t of Youth Auth.*, 271 F.3d 812, 819 (9th Cir. 2001).

A suit against a state official challenging the constitutionality of the official’s action is not considered an action against the State to the limited extent that it seeks prospective injunctive relief as to the official’s conduct rather than an award of damages for past conduct. *Pennhurst*, 465 U.S. at 102-03; *Ex parte Young*, 209 U.S. 123, 160 (1908). A federal court, however, may not instruct state officials on how to conform their conduct to state law. *Pennhurst*, 465 U.S. at 106.


---

2 This discussion focuses on § 1983 claims, but absolute or qualified immunity may also apply to other federal claims. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982).

The nature of the function performed, not the identity of the actor, controls. Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); Romano v. Bible, 169 F.3d 1182, 1186 (9th Cir. 1999). Thus, this is not a blanket immunity: the office does not immunize the official for all of his or her acts. Courts apply a functional approach to determine whether an official is entitled to absolute immunity for the act complained of. Fitzsimmons, 509 U.S. at 269; Romano, 169 F.3d at 1186. For example, prosecutors have absolute immunity for conduct that is “intimately associated with the judicial phase of the criminal process.” Imbler, 424 U.S. at 430. On the other hand, “[a] prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.” Buckley, 509 U.S. at 273.

13.3.4.3 Qualified Immunity. Qualified immunity in § 1983 cases is different from the statutory qualified immunity discussed in Section 13.3.3. Qualified immunity shields government officials from liability for civil damages in a § 1983 case if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person should have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity is an affirmative defense that must be raised by the defendant. Id. at 815. Once the defense is properly raised, the plaintiff then has the burden of proving that the right allegedly violated by the defendant was clearly established. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985); Baker v. Racansky, 887 F.2d 183, 186 (9th Cir. 1989).

In addition to shielding the official from liability, qualified immunity—like other immunities—also provides a shield from the lawsuit itself. Pearson v. Callahan, 555 U.S. 223, 235, 129 S. Ct. 808, 818 (2009). The Supreme Court has stressed the importance of raising questions of immunity as early as possible in the litigation. Id.; Hunter v. Bryant, 502 U.S. 224, 227 (1991). “Until this threshold immunity question is resolved, discovery [on issues other than qualified immunity] should not be allowed.” Harlow, 457 U.S. at 818.
Whether a legal right was clearly established when the conduct occurred is a question of law for the court to decide; it is to be determined objectively without examining the subjective intent of the defendant official. *Harlow*, 457 U.S. at 815-20; *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991). The inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). It is not necessary that the “very action in question has previously been held unlawful,” but “in the light of preexisting law the unlawfulness must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As the Supreme Court further explained:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.


Under its self-insurance program, the State will indemnify state officials and employees for liability in § 1983 actions, including liability for punitive damages, as long as the official or employee was acting in the course and scope of his or her employment or authorization. A.R.S. § 41-621(A)(3). See Section 13.4. If there is a question whether the employee was acting in the course and scope of employment, the State may reserve the right to refuse to pay any judgment. In this instance, the State will hire outside counsel to defend the state employee and will pay all costs of defense until the issue of coverage is resolved.

**13.3.4.4 State Action Immunity Under the Antitrust Laws.** For a discussion of the immunity of the State, other state entities, and state employees from federal antitrust laws, see Sections 5.9.6 and 5.9.6.1.

**13.4 Insurance.**

**13.4.1 Indemnification of State Employees.** To protect state officers and employees from potential liability and promote productivity, the Legislature has provided mandatory indemnification of state officials and employees who are sued for acts performed in the course and scope of their employment or authorization. A.R.S. § 41-621(A)(3). Thus, state officials and employees receive the same coverage that the State itself receives. See id. Coverage includes litigation costs and attorney fees, as well as payment of any settlement or judgment. A.R.S. § 41-622(A). All coverage provided by
self-insurance is excess over any valid and collectible insurance available from other sources. A.R.S. § 41-621(E).

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 or authorization. A.R.S. § 41-621(A)(3). According to A.R.S. § 41-621(R) acts or omissions of a state officer, agent, or employee are within the course and scope of employment or authorization if:

1. They occur while performing duties or functions that the state officer, agent or employee is employed or authorized to perform.
2. They occur substantially within the authorized time and space limits of the person’s state employment.
3. They are done (or not done) at least in part to serve the State or its departments, agencies, boards or commissions.

“[A]n employee is acting within the scope of . . . employment while he is doing any reasonable thing which his employment expressly or impliedly authorizes him to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment.” *McCloud v. Kimbro*, 224 Ariz. 121, 123, ¶ 8, 228 P.3d 113, 115 (App. 2010). This includes, for example, travel to meals and lodging while on out-of-town business. *Id.* at 124, ¶ 12, 228 P.3d at 116.

13.4.3 Extent of Coverage. If the employee’s conduct falls within the terms of A.R.S. § 41-621(A)(3), the Attorney General’s Office will defend the employee or will hire outside legal counsel to do so. A.R.S. § 41-621(M). All attorney fees, court costs, and litigation expenses will be paid from the Department of Administration’s Risk Management revolving fund. A.R.S. § 41-622(A). A settlement or judgment will also be paid from this fund. *Id.*

The state entity and the employee involved must cooperate fully with the Attorney General in the defense of the claim. A.R.S. § 41-621(M); A.A.C. R2-10-102(C).

13.4.4 Automobile Coverage. Insurance coverage, within the limitations of A.R.S. §§ 41-621 to -625, is available for officers, agents, and employees (“employees”) acting within the course and scope of employment while driving either state-owned or non-state-owned vehicles. A.A.C. R2-10-107(A)(1); see Section 13.4.2 (discussing course and scope of employment). Coverage for non-state-owned vehicles is excess coverage; that is, the State will cover only amounts over and above the limits of the employee’s own policy. A.A.C. R2-10-107(A)(1). Coverage for state-owned vehicles, on the other hand, is on a primary basis. *Id.*
Employees driving a state-owned vehicle are deemed to be acting within the course and scope of employment:

1. While driving on authorized state business,
2. While driving to and from work,
3. While driving to and from lunch on a working day,
4. While driving to and from meals while on out-of-town travel.

A.A.C. R2-10-107(A)(2).

Employees are not considered within the course and scope of employment while driving a non-state-owned vehicle:

1. While driving to and from work,
2. While driving to and from lunch in the area of employment and not on officially authorized state business,
3. While driving on other than state-authorized business.

A.A.C. R2-10-107(A)(3).

There is no coverage for an employee while driving a state-owned or non-state-owned vehicle outside the course and scope of employment. A.A.C. R2-10-107 (A)(1).

**13.4.5 Punitive Damages.** Courts generally award punitive or exemplary damages to punish an individual defendant for outrageous conduct, to publicize wrongful acts, and to deter others from engaging in similar conduct. Under Arizona law, punitive damages may be awarded only when the acts reflect an “evil mind.” *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986).

The Legislature has immunized the State from liability for punitive damages for state-law claims. A.R.S. §§ 12-820.04; *see also State v. Sanchez*, 119 Ariz. 64, 69, 579 P.2d 568, 573 (App. 1978) (holding the State immune from punitive damages even in the absence of statutory immunity). The immunity from punitive damages also applies to state employees acting within the scope of his or her employment. A.R.S. § 12-820.04. Statutes providing for treble damages (three times the actual damages) and for minimum damages without proof of actual damages are considered to be punitive in nature. *Wyatt v. Wehmueller*, 167 Ariz. 281, 285-86, 806 P.2d 870, 874-75 (1991). See Section 13.3.4.3 regarding punitive damages for claims based on federal law.
The State will defend state employees against claims for punitive damages based on acts within the course and scope of state employment or authorization, as long as the conduct has not been determined by a court to constitute a felony. A.R.S. § 41-621(A)(3), (L). If there is a question whether the employee’s acts were within the course and scope of employment, the State may reserve the right to refuse to pay any judgment and, in that event, will hire outside counsel to represent the employee.

13.4.6 Property Coverage. Under A.R.S. § 41-621(A)(1), the State’s risk-management program provides coverage against loss or damage to all state-owned buildings in which director of the Department of Administration has determined that the State has an insurable interest, except for community colleges buildings. Also covered against loss or damage are the contents of those buildings. A.R.S. § 41-621(A)(2). All personal property that is reported to the Department of Administration that is either State-owned or is under the State’s clear responsibility because of written leases or other agreements is covered against loss or damage. A.R.S. § 41-621(A)(4). Excluded from this coverage is loss of property “due to mechanical or electrical breakdown, ordinary wear and tear or obsolescence, nonserviceability, mysterious disappearance or inventory shortage.” A.R.S. § 41-622(B).

13.4.7 Acts Excluded from Coverage.

13.4.7.1 Acts Constituting Felonies. A loss caused by an act or omission determined by a court to be a felony is not covered unless the State knew of the employee’s propensity for the particular act. A.R.S. § 41-621(L)(1). This exclusion from coverage does not apply to acts arising out of the operation or use of a motor vehicle. Id.

13.4.7.2 Acts Outside the Course and Scope of Employment or Authorization. If a state employee is sued based on conduct outside the course and scope of his employment, see Sections 13.4.2 and 13.4.3, the State is not obligated to provide self-insurance coverage for that conduct. See A.R.S. § 41-621(A)(3) and (R). If the conduct is clearly outside the course and scope, the State will deny coverage. If there is a question whether the employee’s acts were within the course and scope of employment, the State may reserve the right to refuse to pay any judgment and will then hire outside counsel to represent the employee.

13.5 Procedures for Tort Claims. The procedures for bringing tort claims against state entities or political subdivisions of the state are generally governed by A.R.S. §§ 12-820 to -823. Different procedures apply to contract claims against state entities. See Section 13.6.

13.5.1 Mandatory Presentation of the Notice of Claim. Before a party may file a tort lawsuit against any public entity or employee, the party must file a notice of the claim in compliance with the provisions of A.R.S. § 12-821.01.
The purposes of the statutory notice of claim requirement are: (1) to provide prior notice to allow public entities to investigate and assess potential liability, (2) to facilitate settlement, and (3) to assist in financial planning and budgeting. *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295, ¶ 6, 152 P.3d 490, 492 (2007); *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527 ¶ 9, 144 P.3d 1254, 1256 (2006).

13.5.1.1 Contents of the Notice of Claim. The notice of claim must contain:

- “facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed”
- “a specific amount for which the claim can be settled” and
- “the facts supporting that amount.”

A.R.S. § 12-821.01(A). No Arizona decision has specifically decided whether the requirement to provide facts concerning the claimed basis of liability includes the need to state legal theories. *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162 n.4, 129 P.3d 71, 73 n.4 (App. 2006). But the court of appeals has held that identification of legal theories is not mandated by the requirement to provide facts supporting the amount demanded for settlement, reasoning that that portion of the statute calls for facts, not theories. *Yollin v. City of Glendale*, 219 Ariz. 24, 32, ¶ 26, 191 P.3d 1040, 1048 (App. 2008). The requirement for a specific settlement amount mandates “a particular and certain amount of money that, if agreed to by the government entity, will settle the claim.” *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 9, 152 P.3d 490, 493 (2007). Thus, a claim that tempers the settlement demand with ambiguous expressions like “approximately” and “no less than” is noncompliant. *Id.* But the requirement to provide “the facts supporting that amount” leaves it to the claimant to decide how much information to provide: the notice of claim need only “provid[e] the factual foundation that the claimant regards as adequate to permit the public entity to evaluate the specific amount claimed.” *Backus v. State*, 220 Ariz. 101, 107, ¶ 23, 203 P.3d 499, 505 (Ariz. 2009).

13.5.1.2 Filing the Notice of Claim. The notice-of-claim statute requires that the notice of claim be filed, A.R.S. § 12-821.01(A), which means that it must be actually delivered to the proper recipient, *Lee v. State*, 218 Ariz. 235, 237, ¶ 7, 182 P.3d 1169, 1171 (2008); *id* at 239, ¶ 19, 182 P.3d at 1173. Who is the proper recipient is determined pursuant Arizona Rule of Civil Procedure 4.1. A.R.S. § 12-821.01(A). Notices of claim against the State must be filed with the Attorney General. Ariz. R. Civ. P. 4.1(h). If the claimant desires to proceed against a public employee, a separate notice of claim must be filed with that employee. *Crum v. Superior Court*, 186 Ariz. 351, 352, 922 P.2d 316, 317 (App. 1996). This notice of claim must be delivered to the individual employee. Ariz. R.
Civ. P. 4.1(d). Notices of claim against State agencies that have the power to sue and be sued on their own must be delivered to “the person, officer, group or body responsible for the administration of that entity” or to “the appropriate legal officer, if any, representing the entity.” Ariz. R. Civ. P. 4.1(j). See section 13.2.2 for a further discussion of service.

13.5.1.3 Time for Filing the Notice of Claim. A claim must be filed within 180 days “after the cause of action accrues.” A.R.S. § 12-821.01(A). Under the statute, “a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage.” A.R.S. § 12-821.01(B). In other words, a cause of action accrues “when the plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a particular defendant’s negligent conduct.” Young v. City of Scottsdale, 193 Ariz. 110, 114, 970 P.2d 942, 946 (App. 1998).

13.5.1.3.1 Legal Disability. Minors must file their notices of claim within 180 days after their eighteenth birthday. A.R.S. § 12-821.01(D). Insane or incompetent persons must file their notices of claim within 180 days after their disability ceases. A.R.S. § 12-821.01(D).

13.5.1.4 Disallowance of Claim. Claims are deemed denied sixty days after filing, unless the claimant is advised of the denial in writing before sixty days pass. A.R.S. § 12-821.01(E).

13.5.1.5 Claims Arising under Federal Law. A notice of claim is not required for claims arising under federal law, whether suit is to be filed in federal or state court. Felder v. Casey, 487 U.S. 131, 138 (1988).

13.5.2 Lawsuits Involving Tort Claims.

13.5.2.1 Time for Filing the Lawsuit (Statute of Limitations). “All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.” A.R.S. § 12-821. Arizona follows the discovery rule in determining when a cause of action accrues. A cause of action accrues when the plaintiff “discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant’s negligent conduct.” Anson v. Am. Motors Corp., 155 Ariz. 420, 423, 747 P.2d 581, 584 (App. 1987).

13.5.2.1.1 Tolling. The statute of limitations is tolled for persons with certain legal disabilities. That means that the statute of limitations does not run during the period of that disability. Thus, the statute of limitations does not begin to run against a minor until his or her eighteenth birthday, and it does not run against a plaintiff while that person is of unsound mind. A.R.S. § 12-502. Not every condition affecting mental ability results in an

The statute of limitations is not tolled while the claimant is complying with the notice-of-claim statute. *Stulce v Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 89, ¶ 1, 3 P.3d 1007, 1009 (App. 1999).

13.5.2.2 Jurisdiction and Venue. The Arizona Constitution provides that the superior court has original jurisdiction for matters involving claims of $1,000 or more. Ariz. Const. art. 6, § 14. In A.R.S. § 22-201(B), the Legislature purported to give justice courts exclusive original jurisdiction for all matters involving claims of $5,000 or less. In *State ex rel Neely v. Brown*, 177 Ariz. 6, 8, 846 P.2d 1038, 1040 (1993), the court harmonized the conflict between those provisions, concluding that the superior court had concurrent jurisdiction with the justice court for matters involving claims between $1,000 and $5,000.

Actions against the State may be brought in any county where venue is otherwise proper under the general venue statute, A.R.S. § 12-401. *Dunn v. Carruth*, 162 Ariz. 478, 480, 748 P.2d 684, 686 (1989). Actions against public officers may be brought in any county in which any of the defendant officers holds office. A.R.S. § 12-401(16).

While an action against the State may be brought in any county, the Attorney General’s Office may move the case to Maricopa County pursuant to A.R.S. § 12-822(B). The statute requires that demands for change of venue be filed before, or concurrent with, the answer. In addition to the Attorney General’s Office, private counsel appointed by the Attorney General to represent the governmental defendant may also demand a venue change under A.R.S. § 12-822(B), *State Dep’t of Corr. v. Fenton*, 163 Ariz. 174, 175, 768 P.2d 1025, 1026 (App. 1989). Moreover, the Arizona Court of Appeals has stated in dictum that counsel representing an agency that is exempt from representation by the Attorney General may also require that venue be changed to Maricopa County. *Cochise County v. Borowiec*, 162 Ariz. 192, 194, 781 P.2d 1379, 1381 (App. 1989). Cases moved to Maricopa County under A.R.S. § 12-822(B) are subject to further motions for change of venue under A.R.S. § 12-406. *Dunn*, 162 Ariz. at 480, 784 P.2d at 686. However, a party moving for a second venue change bears the burden of demonstrating that a change is necessary: “The burden of proof is on the moving party, who must show ‘a balance of interests favoring transfer.’” *Id.* at 481, 784 P.2d at 687 (quoting *Cohen v. Superior Court*, 14 Ariz. App. 406, 408, 484 P.2d 18, 20 (1971).

13.5.2.3 Defendants. Although the State of Arizona is usually a named defendant, an agency and individual employees are often also named as defendants. A State agency is not a proper party unless the Legislature has given it authority to sue and to be sued in its own right. *Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972).
13.5.2.4 Pleadings and Service of Process. Service of a summons “in an action against any public entity or public employee involving acts that are alleged to have occurred within the scope of the public employee’s employment” must be made pursuant to the Arizona Rules of Civil Procedure. See Section 13.2 for a discussion of service of a summons on state entities or employees.

13.5.2.5 Judgment, Punitive Damages, Interest, Costs, and Attorney fees. “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 time the obligation accrued and with court costs.” A.R.S. § 12-823. Prejudgment interest will be awarded if the substantive law allows it. Fleming v. Pima County, 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1984). Unless a different interest is contracted for in writing, the statutory rate of ten percent per annum applies. A.R.S. § 41-1201(A). However, if an appeal is taken from a judgment against the State that is to be paid from the Risk Management’s revolving fund, a special interest rate applies. “During the course of the appeal,” interest “shall accrue at the average yield offered by United States treasury bills.” A.R.S. § 12-622(F). If the State loses the appeal, “the judgment amount plus interest at the rate prescribed in this subsection shall be paid.” Id. The judgment’s language need not specifically anticipate the application of this statutory rate. Minjares v. State, 223 Ariz. 54, 59, ¶ 19, 219 P.3d 264, 269 (App. 2009). Nevertheless, to avoid the problems that arose in Minjares, the better practice is to ensure that the actual language in the judgment reflects the possibility of applying this statutory rate should an appeal be taken.

Punitive damages should not be awarded for claims arising under state law because public entities and public employees acting within the scope of their employment are immune from punitive damages for state-law claims. A.R.S. § 12-820.04; see also Section 13.4.5.

Attorney fees are not addressed in the statutory provisions in A.R.S. §§ 12-820 to -826 concerning actions against public entities. Under A.R.S. § 12-348, fees may be awarded against governmental entities for specific types of actions, including civil actions brought by the governmental entity, judicial review of agency decisions, special actions challenging a state action, actions challenging assessment, collection of taxes, and other listed actions.

Arizona statutes do not generally provide for fee awards in tort actions, even if the issues center on a state agency’s decisions. New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185 (1985). However, in one case, the Arizona Court of Appeals held that a statute that grants attorney fees to the successful petitioner in a mandamus action applied even though the suit was a civil action for damages, not a mandamus action. In Bilke v. State, 221 Ariz. 60, 209 P.3d 1056 (App. 2009), prison inmates won damages based on the Department of Corrections’ failure to pay them the federal minimum wage for labor that they had performed for private companies. The court applied A.R.S. § 12-
2030(A), which allows fees for the successful litigant “in a civil action . . . to compel a state officer or any officer of any political subdivision of this state to perform an act imposed by law as a duty on the officer.” The court held that the damages suit requested “mandamus-type relief.” *Bilke*, 221 Ariz. at 62, ¶ 6, 209 P.3d at 1058. “This was not an ordinary action to recover damages for breach of contract or personal injuries. The State’s statutory obligation to make sure inmates were paid minimum wage was mandatory, and the director has no discretion to choose whether to pay the required compensation.” *Id*. at 63, ¶ 12, 209 P.3d at 1059.

Fee awards in contract actions are generally authorized by A.R.S. § 12-341.01.

### 13.5.2.6 Satisfaction of Judgment.
Judgments are satisfied from the permanent liability loss revolving fund as provided in A.R.S. § 41-622. A three-step process for paying each judgment is established in A.R.S. § 12-826. The Governor must report the judgment to the Legislature. A.R.S. § 12-826(A). The Legislature must make an appropriation. A.R.S. § 12-826(C). After the appropriation has been made, the Director of the Department of Administration must draw a warrant after being presented with an authenticated copy of the judgment and the Attorney General’s approval. A.R.S. § 12-826(B).

### 13.5.3 Settlements.
Upon receipt of a notice of claim or a summons and complaint, 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 $100,000 or less may be settled with the approval of the Director of DOA. When the settlement payment is from $100,000 to $250,000, approval by the Director of DOA and the Attorney General is required. A.R.S. § 41-621(N); Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A). When the settlement sum exceeds $250,000, the Director of DOA, the Attorney General, and the Joint Legislative Budget Committee must approve it. A.R.S. § 41-621(N); Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A).

### 13.6 Procedures for Contract Claims.

#### 13.6.1 Applicability of Procurement Code.
The Procurement Code and associated rules adopted by the DOA Director provide “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 statute explicitly excludes the notice-of-claim process established in A.R.S. § 12-821.01, as well as arbitration under the Uniform Arbitration Act. *Id*. With limited exceptions, the Procurement Code “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(7) as “all types of state
agreements, regardless of what they may be called, for the procurement of materials, services, construction, construction services or the disposal of materials." “Procurement” is defined in A.R.S. § 41-2503(31)(A) to include “buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services.” But the definition of “materials” excludes from the Procurement Code’s purview acquisitions of land, permanent interests in land or real property, and leasing space. A.R.S. § 41-2503(26). A general discussion of the Procurement Code, including its scope, appears in Chapter 5.


13.6.2.1 Procedures Under Title 35. Under A.R.S. § 35-181.01(A), all claims against the State arising from contracts “shall be paid in accordance with procedures prescribed by the director of the department of administration.” In most cases, the State will make payment when the prescribed procedures have been followed and the claim is valid. If a dispute regarding a claim’s payment arises, the dispute-resolution procedures of the Procurement Code come into play. See Section 5.6 for a more extensive discussion of the claim procedures.

13.6.2.2 Dispute-Resolution Procedures of the Procurement Code. The Director of DOA “may 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 Administrative Procedures Act applicable to contested cases A.R.S. § 41-1092. A.R.S. § 41-2611(A). The Director has promulgated the required rules. See A.A.C. R2-7-A901 to -A911.

13.6.3 Judicial Review of Decisions of the Director of DOA in Contract Claims Disputes. The Director’s decisions under the Procurement Code may be reviewed under the Administrative Review Act, A.R.S. §§ 12-901 to -914. See A.R.S. § 41-2614. This remedy is exclusive. A.R.S. § 41-2615. Venue is exclusive in the Maricopa County Superior Court. A.R.S. § 41-2614. The action must be filed “within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected.” A.R.S. § 12-904(A).

13.6.4 Contract Claims Not Covered by the Procurement Code. Only the Board of Regents, the Legislature and the courts are generally excluded from coverage under the Procurement Code. A.R.S. § 41-2501(D). The State Compensation Fund is excluded from coverage under the Procurement Code until January 1, 2013. Id. However, the Board of Regents and the judicial branch must establish their own procurement rules. A.R.S. § 41-2501(E). Other limited exemptions for particular contracts of specified agencies are set forth at A.R.S. § 41-2501(F) through (EE).
In other cases involving particular exempt contracts, the affected agency has the same authority to adopt rules as does the Director of DOA. A.R.S. § 41-2501(N). Any such rules may provide some sort of administrative dispute-resolution procedure in compliance with the provisions of the Uniform Administrative Hearing Procedures Act, A.R.S. §§ 41-1092 to -1092.12.

Thus, when a contract dispute arises, one should first determine if the Procurement Code’s dispute-resolution procedures apply. If they do 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.

If the Procurement Code and accompanying rules do not apply to a contract claim and if the contracting agency has no applicable rules, the procedures regarding appealable agency actions may apply. See Chapter 10.2.2.2 for a discussion of appealable agency actions.

13.6.5 Applicability of Procurement Code Procedures to Tort Claims Related to Contracts. 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. A.R.S. § 41-2615. Therefore, other statutes, specifically including A.R.S. §§ 12-821 to -823, do not apply in resolving contract disputes arising from a Title 41 procurement.

13.6.6 Attorney fees. Under A.R.S. § 41-1007, a hearing officer or administrative law judge shall award fees and other costs if the agency’s action was not substantially justified. A.R.S. § 41-1007(A)(1). The provisions of A.R.S. § 12-348(A)(2) allow recovery of attorney fees in “[a] court proceeding to review a state agency decision, pursuant to [A.R.S. §§ 12-901 to -914].” This statute applies to actions under the Administrative Procedure Act, see New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 109, 696 P.2d 185, 199 (1985), and thus would allow fee awards in judicial review proceedings in Procurement Code cases. Note, however, that because such fee awards are limited to “court proceeding[s],” the statute does not apply to administrative proceedings before the Director of DOA.

Under A.R.S. § 12-341.01(A), the prevailing party may recover attorney fees in an “action arising out of a contract.” Although contract disputes may arise between a contractor and the State under a contract awarded pursuant to the Procurement Code, A.R.S. § 12-341.01 might not apply if A.R.S. § 12-348(A)(2) is applicable. The language of A.R.S. § 12-341.01 providing that the statute shall not be construed as “altering, prohibiting or restricting present or future contracts or statutes that may provided for attorney fees” means that A.R.S. § 12-341.01 is subordinate to other statutes which may provide for fees. Lange v. Lotzer, 151 Ariz. 260, 261-62, 727 P.2d 38, 39-40 (App. 1986) (citing the quoted language in support of its holding that a more specific attorney fees statute trumped A.R.S.
Whether A.R.S. § 12-348(A)(2) would be considered a more specific statute than and therefore trump A.R.S. § 12-341.01(A) is an open question.

One appellate decision has upheld an award of fees under A.R.S. § 12-341.01(A) in a special action brought by an unsuccessful bidder challenging an award. *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 673 P.2d 934 (App. 1983). Whether that decision would support an award under A.R.S. § 12-341.01(A) to an unsuccessful bidder in a challenge brought under the Procurement Code is questionable, and indeed its holding that the statute supported fees for the special action has become highly suspect. The court there held that the action arose out of contract—as A.R.S. § 12-341.01(A) requires—because the “contract was a factor causing the dispute.” *Id.* at 192, 673 P.2d at 936. The Arizona Supreme Court subsequently limited the application of A.R.S. § 12-341.01(A) to matters in which the gist of the plaintiff's claim is an alleged breach of contract. In *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987), it vacated the award of fees granted to the plaintiffs in a legal-malpractice suit, holding that the claim did not arise out of the contract that created the attorney-client relationship, but rather from general principles imposed by law: “[W]here the . . . contract does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent action for breach is tort, not contract.” *Id.* at 523, 747 P.2d at 1222. Because—by definition—the unsuccessful bidder has no contract, its claim against the government must rest on duties created elsewhere and the action therefore does not arise out of contract. And if, as is posited above, the successful bidder cannot rely on A.R.S. § 12-341.01(A) in an action for judicial review of an administrative procurement decision—even though it actually has a contract—then the unsuccessful bidder, which lacks a contract on which to base its claim, should not be able to rely on that section.

In any event, any award of attorney fees under A.R.S. § 12-341.01 is limited to work done in court proceedings; the statute does not permit an award of attorney fees for work done in administrative proceedings. *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611, 838 P.2d 1369, 1372 (App. 1992).

Finally, A.R.S. § 12-349, which provides for the mandatory award of attorney fees where civil actions are brought or defended without substantial justification or in other specified circumstances involving abuse of judicial processes, would also apply to court proceedings brought under the Procurement Code.
# CHAPTER 14

## DETECTION OF CRIMINAL VIOLATIONS

Table of Contents

<table>
<thead>
<tr>
<th>Section 14.1</th>
<th>Scope of this Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.1.1</td>
<td>Introduction</td>
</tr>
</tbody>
</table>

| Section 14.2 | Reporting of Crimes |

<table>
<thead>
<tr>
<th>Section 14.3</th>
<th>Criminal Activities Potentially Affecting State Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.3.1</td>
<td>Threatening, Intimidating, or Harassing</td>
</tr>
<tr>
<td>14.3.2</td>
<td>Criminal Damage to Property</td>
</tr>
<tr>
<td>14.3.3</td>
<td>Theft</td>
</tr>
<tr>
<td>14.3.4</td>
<td>Forgery and Fraud</td>
</tr>
<tr>
<td>14.3.5</td>
<td>Obstructing Government Operations, Impersonating a Public Servant, and Tampering with or Falsifying Public Records</td>
</tr>
<tr>
<td>14.3.6</td>
<td>Bribery and Trading in Public Office</td>
</tr>
<tr>
<td>14.3.7</td>
<td>Perjury and False Swearing</td>
</tr>
<tr>
<td>14.3.8</td>
<td>Miscellaneous Arizona Crimes</td>
</tr>
<tr>
<td>14.3.9</td>
<td>Federal Crimes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 14.4</th>
<th>Crimes Against People</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.4.1</td>
<td>Fraud</td>
</tr>
<tr>
<td>14.4.1.a</td>
<td>Warning Signs of Potential Criminal Activity by Regulated Enterprises</td>
</tr>
<tr>
<td>14.4.1.b</td>
<td>Warning Signs of Possible Fraud in Consumer or Investor Transactions</td>
</tr>
<tr>
<td>14.4.2</td>
<td>Recognizing and Reporting Child Abuse</td>
</tr>
</tbody>
</table>

Revised 2011
CHAPTER 14

DETECTION OF CRIMINAL VIOLATIONS

14.1 Scope of this Chapter. This Chapter discusses crimes that state officers and employees commit against either the State or third parties, crimes that third parties commit against the State or its employees, and the proper reporting of suspected criminal activity.

14.1.1 Introduction. The Arizona Legislature has enacted numerous laws criminalizing certain activities. Some of these laws are very specific and deal only with governmental activities, while others prohibit specified conduct more generally. State officers and employees must be aware of what conduct has been criminalized so that they can detect and report suspicious activities to the proper authorities.

Public officers and employees who violate the laws discussed in this Chapter or any other criminal law risk serious consequences. In addition to potential criminal prosecution, they may face discharge from public employment as well as the damages, civil penalties, costs, and attorney’s fees that may be imposed in a civil action that the State files against them.

14.2 Reporting of Crimes. In performing their duties, state officers and employees may obtain information that leads them to suspect that a crime has been or is being committed by a third person against the State, by a state officer or employee against the State, or by a state officer or employee against a third party. In any of these situations, the agency or employee should immediately contact the Attorney General’s Office. The rules that govern criminal investigations are complex and constantly changing, and state employees should not attempt to investigate crimes themselves. Even innocent mistakes may prevent successful investigation and prosecution. Early consultation is important to prevent legal problems, to identify and preserve evidence, and to ensure a fair and thorough investigation.

14.3 Criminal Activities Potentially Affecting State Government. The acts described below are criminal offenses that may be encountered in the operation of state government. See also Section 2.15; Chapter 8.

14.3.1 Threatening, Intimidating, or Harassing. Public employees may be subject to or may engage in threats or intimidation. Arizona Revised Statutes § 13-1202 criminalizes threatening or intimidating by word or conduct. Subsection (A)(2) of that statute prohibits causing or in reckless disregard causing “serious public inconvenience,” which includes “evacuation of a building, place of assembly, or transportation facility.” In
addition, A.R.S. § 13-2916(A) prohibits using a telephone to terrify, intimidate, threaten, harass, annoy, or offend by (1) threatening physical harm to persons or property; (2) using obscene, lewd, or profane language; (3) suggesting lewd or lascivious acts; or (4) making repeated anonymous calls. See State v. Musser, 194 Ariz. 31, 977 P.2d 131 (1999) (upholding a prior version of the statute in a case in which a citizen had threatened an Arizona Supreme Court justice over the telephone).

Arizona Revised Statutes § 13-2921 prohibits harassing any citizen. This includes making a false report to a law enforcement, credit, or social service agency. Subsection B makes it a crime to harass a public officer or employee by wrongfully filing a lien against the officer’s or employee’s property. See also A.R.S. § 13-2923 (prohibiting “stalking”).

14.3.2 Criminal Damage to Property. The State is a major owner of property, and persons damaging state property are subject to criminal liability under A.R.S. § 13-1602. Criminal damage includes drawing or inscribing a message, slogan, sign, or symbol on a public building. A.R.S. § 13-1602(A)(5). Another statute prohibits criminal littering or polluting. A.R.S. § 13-1603. This statute expressly includes littering or polluting “public property.” A.R.S. § 13-1603(A)(1).

14.3.3 Theft. Theft may be committed in several ways, but it is basically the controlling of another person’s property or services without authority. A.R.S. § 13-1802. Because “person” includes “a government” or “a governmental authority,” the unauthorized controlling of the property of the State or a state agency is a criminal offense. A.R.S. § 13-105(20), (30).

Theft is not limited to taking someone else’s property, but also encompasses “controlling” property under various circumstances. A.R.S. § 13-1802(A). Thus, a person can commit theft by using in an unauthorized manner services or property entrusted to him; obtaining property through a material misrepresentation; failing to return lost, mislaid, or misdelivered property when circumstances allow the true owner to be located; and possessing property while knowing or having reason to know that the property is stolen. Id. A person can also commit theft by controlling an incapacitated or vulnerable adult’s assets through intimidation or deception while acting in a position of trust and confidence.

One potential area of theft in state government is embezzlement of funds. See State v. Tramble, 144 Ariz. 48, 695 P.2d 737 (1985) (noting that embezzlement is one way of committing theft). In addition to the general crime of theft, there are more specific laws relating to taking public property. For example, A.R.S. § 35-301 prohibits misappropriation of public money by public officers or employees. See Section 2.15(16). A public officer’s or employee’s acceptance, retention, or diversion of a subordinate’s salary or fees violates A.R.S. § 38-609.

Under Arizona law, taking state property or services is “theft,” no matter how small the value of what is taken. A.R.S. § 13-1802(G). The value determines only the class of
felony or misdemeanor, which in turn determines the possible range of penalties. *Id.* Theft of a firearm, no matter its value, is always a felony. *Id.*

Other statutes criminalize other forms of theft. See, e.g., A.R.S. § 13-1804 (theft by extortion). For example, it is unlawful to obtain property or services by threatening to “take or withhold action as a public servant or [to] cause a public servant to take or withhold action.” A.R.S. § 13-1804(A)(7); *see also* A.R.S. §§ 13-1806 (failure to return rented or leased property); -2008 (theft of identity). It is also a crime to place an insignia that has been approved for designating a state motor vehicle upon a vehicle that is not a state vehicle. A.R.S. § 38-538.01. The unauthorized manufacture, duplication, use, or possession of a key to a public building is also a crime. A.R.S. § 13-3715.

14.3.4 Forgery and Fraud. A person commits the crime of forgery by doing any of the following with the intent to defraud: making, completing, or altering a written instrument; knowingly possessing a forged instrument; or offering a forged instrument or one that contains false information. A.R.S. § 13-2002. A related crime is criminal impersonation with intent to defraud. A.R.S. § 13-2006 (also discussed in Section 14.3.5).

The most expansive statute regarding fraud makes it a felony for any person to obtain any benefit from any person, including the State, through fraud. A.R.S. § 13-2310 (fraudulent schemes and artifices). To be guilty of this crime, a person must “make false representations to obtain a benefit with knowledge of the [existence of a] fraudulent scheme and in furtherance of it.” *State v. Bridgeforth*, 156 Ariz. 60, 64, 750 P.2d 3, 7 (1988). Thus, any person who obtains benefits or money from the State by an intentional misrepresentation (including a material omission) has committed criminal fraud. *See also* A.R.S. § 13-2316 (computer tampering).

There are more specific statutes that deal with fraud in state employment. These might cover, for example, filing a false timesheet, leave report, travel expense report, per diem voucher, or other claim against the State as well as filing a false report relating to the performance of official duties. *See A.R.S. §§ 13-2407 (making, presenting, or filing a false public record); -2311 (engaging in fraudulent schemes or practices in any matter related to the business that any state department, agency, or political subdivision conducts).*

14.3.5 Obstructing Government Operations, Impersonating a Public Servant, and Tampering with or Falsifying Public Records. It is a crime for a person to hinder or obstruct the performance of a state officer’s or employee’s duties through either the threat or the actual use of force. A.R.S. § 13-2402; Section 2.15(1).

It is also a crime for anyone to pretend to be a public employee if that person intends to induce another to rely on his or her pretended official authority. A.R.S. § 13-2406; Section 2.15(2). Thus, it is a crime to pose as a state employee or other government official with the intent to induce another to submit to one’s pretended authority. *See also* Section 14.3.8(6).
It is a class 6 felony to destroy public records or to alter or falsify public records with an intent to defraud someone. A.R.S. § 13-2407; Section 2.15(3). If the officer who has custody of the records destroys or tampers with them, the crime is a class 4 felony. A.R.S. § 38-421(A); Section 2.15(22). It is also a crime to knowingly make a false statement or to falsify or permit to be falsified any record with intent to defraud the Arizona State Retirement System, A.R.S. § 38-793, or the public safety retirement system, A.R.S. § 38-849(B).

A person who obstructs or hinders a public officer from collecting revenue, tax, or other money in which the State has an interest is guilty of a crime. A.R.S. § 13-2410.

14.3.6 Bribery and Trading in Public Office. A person commits the crime of “bribery of a public servant or party officer” by, with corrupt intent, either (1) offering, conferring, or agreeing to confer any benefit upon a public servant or a party officer with the intent to influence the public servant or party officer with regard to any action in his official capacity or (2) while being a public servant or a party officer, soliciting, accepting, or agreeing to accept any benefit upon an agreement or understanding that any action in one’s official capacity may be influenced. A.R.S. § 13-2602(A); Section 2.15(4). Thus, both private citizens and public servants may be guilty of bribery. See State v. Walker, 185 Ariz. 228, 914 P.2d 1320 (App. 1995) (Arizona state senator and lobbyist both convicted of bribery). “Benefit” means anything of value or advantage in the present or in the future. A.R.S. § 13-105(3).

It is unlawful to purchase or sell the right to obtain employment in a public office. A.R.S. § 13-2603; see also Section 2.15(5).

A person can obtain a benefit by making a claim or representation that one can or will improperly influence a public officer’s or employee’s actions. A.R.S. § 13-2606.

14.3.7 Perjury and False Swearing. State officers and employees should be particularly vigilant because perjury, false swearing, or unsworn falsifications can occur in connection with the activities of any state department or agency.

A person can commit the crime of perjury by (1) making a false sworn statement with regard to a material issue, believing it to be false, or (2) making a false, unsworn declaration, certificate, verification, or statement in regard to a material issue and declaring it, under penalty of perjury, to be true, while believing it to be false. A.R.S. § 13-2702. Unlike forgery, perjury does not require an intent to defraud. Id.

A related crime is false swearing, which is making a false sworn statement believing it to be false. A.R.S. § 13-2703; see also Section 2.15(6), (7). It is also a crime to make a false, material statement in an application for any benefit, privilege, or license or to make a
false material statement to a public official in connection with any official proceeding. A.R.S. § 13-2704; see also Section 2.15(8).

**14.3.8 Miscellaneous Arizona Crimes.** Various other state statutes involve crimes that particularly concern state government. The following are some examples:

1. It is a crime for a state officer or employee to fail to perform a required duty. A.R.S. § 38-443. This is also known as nonfeasance in office. Id.; see also Section 2.15(25).

2. It is unlawful to charge fees for public services that are higher than those allowed by law. A.R.S. § 38-413; see also Section 2.15(20).

3. It is unlawful for a state officer or employee to fail to file required reports of monies collected. A.R.S. § 38-414; see also Section 2.15(21).

4. It is a crime for an officer charged with collecting, receiving, or disbursing any tax revenue of the State or of any political subdivision to refuse to allow the Attorney General or the county attorney to inspect the financial records of his office. A.R.S. § 38-422.

5. It is a crime for a public employee to make an unauthorized use or disclosure of confidential information or to disclose or use such information for personal profit. A.R.S. §§ 38-504(B), -510.

6. It is unlawful for a person to act as a public officer if that person has not been elected or appointed to the public office or if the person’s term of office has expired, A.R.S. § 38-234, or if the person has failed to take the oath of office or to post a required bond, A.R.S. § 38-442. See also Sections 2.15(2), (24); 14.3.7.

**14.3.9 Federal Crimes.** State employees must also be aware of acts that are crimes under federal law and of the related Arizona crimes.

a. **Antitrust Crimes.** Violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, which prohibits conspiracies in restraint of trade, are felonies that are punishable by fines to individuals of up to $350,000 and imprisonment for up to three years. See also Section 5.9.3.1. Violations of the state bid-rigging statutes are also crimes. A.R.S. § 34-252; see also A.R.S. § 44-1416; Sections 5.9.4.2, 5.9.5.2. State employees may be immune from prosecution under certain specified doctrines, see, e.g., Section 5.9.6.1, but may be liable for conspiracies with private individuals and firms, see Section 5.9.5. An example of a governmental antitrust crime is a procurement officer accepting a kickback for awarding a public contract.
b. **Copyright laws.** Copyrighted works, such as maps, books, or computer software, are protected against copying by federal law. See 17 U.S.C. §§ 107, 117, 506(a); 18 U.S.C. § 2318(b)(3). Criminal remedies protect the copyright owner. See 17 U.S.C. § 506(a); 18 U.S.C. § 2318(b)(3). Software publishers, in particular, have taken aggressive action to protect their works. Unauthorized copying by state employees can subject the State to substantial liability, and the employee may also face criminal prosecution. See also A.R.S. § 44-1451 (establishing civil remedies for infringement).

14.4 **Crimes Against People.** Arizona’s criminal statutes obviously include many crimes that involve victims other than the state government or state employees. Too often, crimes against such victims come to the attention of law enforcement authorities well after a person has been victimized. Two areas of crimes against people should be of special concern to Arizona state employees: fraud and child abuse.

14.4.1 Fraud. The crime of fraud has been discussed above. Vigilance by state employees will facilitate earlier fraud detection and increase the chances of recovering victims’ money and property. A state agency can provide this public service by having its employees who work with the public—e.g., inspectors, auditors, investigators, examiners, and employees who receive calls from the public—be alert to the warning signs of an ongoing fraud.

a. **Warning Signs of Potential Criminal Activity by Regulated Enterprises.** An agency may unearth potential criminal activity during many of its normal functions, such as auditing or inspecting a regulated enterprise’s books or premises, reviewing a license or permit application, or conducting an administrative investigation or a formal or an informal administrative proceeding. Many of the following indicators apply equally to charitable and business organizations. The warning signs include the following:

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 reports excessive overhead expenses.

3. The enterprise pays for significant private expenditures, for example, an officer’s mortgage payments.

4. The organization pays very high salaries, dividends, or interest payments.

5. Very little of the money coming into the enterprise goes back into the business.

6. The organization shows high profits but little capitalization.
7. The organization is not licensed, employs nonlicensed personnel, or sells unregistered securities. A.R.S. § 44-1842.

8. The organization is a foreign corporation that is not registered in Arizona.

9. The organization’s records are seriously inadequate.

10. The company’s records show transfers of money or property to public officials.

11. The company’s records 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 are supported by suspicious-looking documentation.

13. A pattern of complaints of excessive billing or “double billing” of patients, clients, or insurance companies exists.

14. A healthcare 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 questions, comments, or complaints about persons under the agency’s jurisdiction. If a caller complains of any of the warning signs listed above, the agency should refer the complaint to the Consumer Information and Complaints Office at the Attorney General’s Office.

b. **Warning Signs of Possible Fraud in Consumer or Investor Transactions.**

Fraudulent activity, such as an unlawful telemarketing scheme that promises valuable prizes in exchange for payments to the solicitor, is often directed at consumers or investors. Warning signs for this type of fraudulent activity include:

1. The prospective client or investor must 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 equipment or products.

5. The equipment or products received are shoddy.
6. The company is uncooperative and does not return the individual’s calls.

7. The company’s check bounces.

8. The company gives the individual “the run-around.”

9. Other investors or customers 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 that is available to the consumer only through this company.

12. The sales staff emphasize their knowledge in the product area, but cannot answer questions that are not included in their prepared script.

13. The sales staff assures the customer that they are selling the product primarily as a public service, not because they receive commissions.

14. A mail drop or post office box 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 local company’s out-of-state affiliate.

16. The company refuses to provide names of satisfied customers.

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.

14.4.2 Recognizing and Reporting Child Abuse. It is very important for state agencies and their employees to recognize and report child abuse. Under A.R.S. § 13-3620, specified persons must report nonaccidental injuries, physical neglect, and the denial or deprivation of necessary medical or surgical care or nourishment to minors. Those required to report are various medical personnel, school personnel, social workers, peace officers, parents, counselors, clergymen or priests, or “any other person who has responsibility for the care or treatment of the minor.” Id.

The crime of child abuse includes the intentional infliction of physical harm, injury caused by criminally negligent acts or omissions, unlawful imprisonment, and sexual abuse or sexual assault. A.R.S. § 13-3623(F). The severity of the crime depends on the circumstances. A.R.S. § 13-3623(A), (B).
Numerous other statutes are specifically targeted at those who commit crimes against children. See, e.g., A.R.S. §§ 13-1405 (sexual conduct with a minor); -1410 (molestation of a child); -1417 (continuous sexual abuse of a child); -3206 (taking a child for prostitution purposes); -3409 (involving or using minors in drug offenses); -3551 to -3561 (sexual exploitation of children).
CHAPTER 15
DISCRIMINATION LAW

Table of Contents

Section 15.1  Scope of This Chapter
Section 15.2  Title VII and the Civil Rights Act of 1991
Section 15.3  The Arizona Civil Rights Act
Section 15.4  Race and Color Discrimination
Section 15.5  National Origin Discrimination
  15.5.1  Language
  15.5.2  Alienage
Section 15.6  Religious Discrimination
Section 15.7  Sex Discrimination
  15.7.1  Pregnancy/Maternity Discrimination
  15.7.2  Sexual Harassment
Section 15.8  Equal Pay Discrimination
Section 15.9  Lilly Ledbetter Equal Pay Act
Section 15.10 Harassment
Section 15.11 Age Discrimination
  15.11.1  Waivers
Section 15.12 Discrimination Based on Disability
  15.12.1  Defining “Disability”
15.12.2 “Qualified Individual” with a Disability
15.12.3 Defenses Available to Employers
15.12.4 Reasonable Accommodation
15.12.5 Medical Inquiries and the Confidentiality of Medical Information
15.12.6 Other Legislation Prohibiting Discrimination Against Persons with Disabilities
15.12.7 Practical Pointers
Section 15.13 Genetic Information Discrimination
Section 15.14 Intersectional Discrimination
Section 15.15 Retaliation
Section 15.16 Affirmative Action as a Component of a Voluntary Plan
  15.16.1 Affirmative Action as a Component of Court-Ordered Relief
Section 15.17 Facial Discrimination
  15.17.1 Bona Fide Occupational Qualifications
Section 15.18 Disparate Treatment
Section 15.19 Disparate Impact
Section 15.20 Mixed Motive Cases
Section 15.21 Remedies under the Arizona Civil Rights Act
Section 15.22 Remedies in Title VII and § 1981 Actions
Section 15.23 Attorney’s Fees
Section 15.24 Remedies for an Equal Pay Act Violation
Section 15.25 Remedies under the ADEA

Revised 2011
<table>
<thead>
<tr>
<th>Section 15.26</th>
<th>Remedies under the ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 15.27</td>
<td>Disability-based Discrimination in Public Services and Accommodations</td>
</tr>
<tr>
<td>15.27.1</td>
<td>General Discrimination Prohibitions</td>
</tr>
<tr>
<td>15.27.2</td>
<td>Eliminating Segregation and Other Barriers</td>
</tr>
<tr>
<td>15.27.3</td>
<td>Physical Accessibility Requirements</td>
</tr>
<tr>
<td>15.27.4</td>
<td>Program Accessibility</td>
</tr>
<tr>
<td>15.27.5</td>
<td>Communications</td>
</tr>
<tr>
<td>15.27.6</td>
<td>New Construction and Alterations</td>
</tr>
<tr>
<td>15.27.7</td>
<td>Remedies for Disability-based Discrimination</td>
</tr>
</tbody>
</table>
CHAPTER 15

DISCRIMINATION LAW

15.1 Scope of This Chapter. This Chapter discusses the principal federal and state statutes enacted to combat discrimination, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Arizona Civil Rights Act.

Sections 15.2 - 15.26 address the application of the anti-discrimination laws in the context of employment by state agencies and other entities. Independent of the statutes discussed in this Chapter, other sources of law, including the state or federal constitutions, statutes and regulations, and the common law of contract and torts, may affect state employer-employee relationships, including claims of discrimination in the workplace. Accordingly, in addressing issues related to discrimination, state employers should consult with their legal counsel to ensure that all relevant laws are considered. For a general discussion of personnel issues, see Chapter 3 of this Handbook.

Section 15.27 addresses the important issue of preventing discrimination against persons with disabilities in the provision of public services or in public accommodations.

Other useful resources for topics addressed in this Chapter include:

For employment topics, the website for the U.S. Equal Employment Opportunity Commission at www.eeoc.gov which includes general information and copies of pertinent policies, guidelines, and manuals.

For issues related to the Americans with Disabilities Act (ADA), the website at www.usdoj.gov/crt/ada/adahom1.htm or the Department of Justice ADA information line at: 800-514-0301 (voice) or 800-514-0383 (TDD).

15.2 Title VII and the Civil Rights Act of 1991. The major modern antidiscrimination legislation affecting employment is Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e to 2000e-17. Title VII prohibits discrimination in employment based on any of the following: race, color, religion, sex, national origin, or a person's association with a protected class member. Title VII also prohibits retaliation against an individual who has opposed a discriminatory practice, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. Title VII protects employees from discrimination in all aspects of the employment relationship, including hire, terms and conditions, benefits, promotion, layoff, and termination.
Title VII covers state and local governmental employers. Title III of the Civil Rights Act of 1991, 2 U.S.C. § 1220 (subsequently transferred to 42 U.S.C. §2000e-16c), gave previously exempt state employees many of the same procedural and substantive rights that Title VII provided. Title III covers members of an elected official's personal staff, those serving an elected official on a policy-making level, and those serving an elected official as immediate advisors with respect to the exercise of the office’s constitutional or legal powers.¹

The courts interpreted Title VII expansively throughout the 1970s and early 1980s, and the resulting developments included the disparate impact theory discussed below. In the latter half of the 1980s, the United States Supreme Court narrowed its interpretation of Title VII, making proof of discrimination by disparate impact more difficult. However, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at Titles 2, 16, 29, 42 [including §§ 1981, 1981a, and 1988]), legislatively reversed in whole or in part these and other narrowing interpretations. See, e.g., 42 U.S.C. § 2000e-2(k)(1), (n)(1). Other legislative reversals include the addition of § 2000e-2(m) (providing that a violation occurs if discriminatory intent is a motivating factor for any employment decision, even though there are other motivating factors) and 42 U.S.C. § 2000e(f) (providing protection for extraterritorial employment).

Federal decisions that predate November 21, 1991, should not be relied upon without checking the 1991 Act to see if the decisions remain intact. Where pre-1991 law is cited in this Chapter, the citations are either to decisions that the 1991 Act "reinstated" or to those that the Act did not affect.

15.3 The Arizona Civil Rights Act. When enacted in 1974, the Arizona Civil Rights Act, A.R.S. §§ 41-1401 to -1493.02, was similar to Title VII of the Civil Rights Act and included substantially identical substantive prohibitions, administrative remedies, and enforcement mechanisms. The Arizona Civil Rights Act has been amended several times. Currently it prohibits discrimination based on race, color, sex, religion, national origin, age, physical or mental disability, and genetic testing results, and prohibits retaliation because a person has opposed discriminatory practices, filed a discrimination charge, or otherwise participated in a judicial or administrative proceeding concerning a discrimination complaint. A.R.S. §§ 41-1463, -1464. The Arizona Civil Rights Act also created the Civil

¹ This enactment was not, however, an amendment to Title VII. Under Title VII’s definition of "employee," employees who serve elected officials still appear to be entirely exempt. See 42 U.S.C. § 2000e(f). Rules concerning the employment discrimination complaints of previously exempt state and local governmental employees can now be found at 29 C.F.R. §§ 1603.100 to 1603.215.
Rights Division within the Arizona Attorney General's Office as a state counterpart to the federal Equal Employment Opportunity Commission (EEOC), A.R.S. § 41-1401(A); provided an administrative procedure for the filing and investigation of discrimination charges, A.R.S. § 41-1481(A) to (C); gave the Civil Rights Division (“Division”) the authority to go to court to enforce its discrimination findings, id. § (D); and gave the charging party the right to seek relief in court whether or not the Division found cause to believe that discrimination had occurred. Id.

To be covered by Title VII or the Arizona Civil Rights Act, the employer generally must have had fifteen or more employees for twenty or more weeks during the current or preceding year. 42 U.S.C. § 2000e(b); A.R.S. § 41-1461(6)(a). However, if the employee alleges sexual harassment under the Arizona Civil Rights Act, the employer need only have had only one employee during the current or preceding calendar year. A.R.S. § 41-1461(6)(a).2

Title VII discrimination charges must be filed with the EEOC within 300 days of the most recent discriminatory action, 42 U.S.C. § 2000e-5(e)(1). Discrimination charges filed under the Arizona Civil Rights Act must be filed “within [180] days after the alleged unlawful employment practice occurred.” A.R.S. § 41-1481(A).

The most common types of discrimination complaints include sexual harassment, pregnancy discrimination, failure to accommodate an individual’s disability, or differential treatment based on race, sex, national origin, age, or disability. Other types of complaints include racial and ethnic harassment, disparate impact claims, pay disparity, and retaliation. Each of these bases is discussed below.

2 The federal Equal Pay Act (EPA), 29 U.S.C. § 206, which is part of the Fair Labor Standards Act (FLSA), uses the FLSA’s definition of "employer." That definition generally covers all persons whom an employer suffers or permits to work for it. 29 U.S.C. § 203(g). Exceptions exist for employees in the legislative branch who are not employed in the legislative library and for elected officials, members of their personal staffs, persons whom they appoint to policy-making positions, and their immediate advisors with respect to their constitutional or legal powers. Id. § 203(e)(2)(C). Other exemptions exist for certain federal employees, Id. § 203(e)(2)(A); postal employees, Id. § 203(e)(2)(B); agricultural employees, Id. § 203(e)(3); and certain volunteers for state or local governments, Id. § 203(e)(4). The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 to -634, contains similar exemptions, but also requires that an employer employ twenty or more employees for twenty or more weeks during the current or preceding calendar year. Id. § 630(b). This numerical requirement does not exist under the EPA.
15.4 Race and Color Discrimination. Discrimination based on race or color, which includes discrimination based on physical characteristics and skin color, violates Title VII and the Arizona Civil Rights Act. Title VII and the Arizona Civil Rights Act are violated when an individual is treated differently because of these factors or when an employer uses facially neutral criteria that disproportionately exclude individuals because of their race, unless the criteria are necessary to the safe and efficient operation of an employer’s business. In addition, both acts prohibit harassment of an individual because of the individual’s race or color or because the individual associates with persons of a different race or color. Race cannot be a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1). See Section 15.17.1 for an explanation of a bona fide occupational qualification.

Like Title VII and the Arizona Civil Rights Act, 42 U.S.C. § 1981 also prohibits discrimination against members of majority groups such as whites or males. The operative language of § 1981 is "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Caucasians, as well as minorities, may claim remedies for race discrimination under this section. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286-87 (1976).

Other persons who are now usually considered to be Caucasians, such as Arabs and Jews, are also protected. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (Arabs); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (Jews). Although there are no United States Supreme Court decisions on the precise issue, most courts agree that Hispanic Americans are also protected. See, e.g., Manzanares v. Safeway Stores, Inc., 593 F.2d 968. 970 (10th Cir. 1979); Gomez v. Pima Cnty., 426 F. Supp. 816, 818 (D. Ariz. 1976).

15.5 National Origin Discrimination. National origin discrimination, which includes discrimination based on place of origin or on a physical, cultural, or linguistic characteristic of an identifiable group, violates Title VII and the Arizona Civil Rights Act. Theoretically, employers can claim that a particular national origin is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e); A.R.S. § 41-1463(G)(1). However, use of this defense has been minimal. The major issues relating to national origin discrimination are language and alienage. Decision makers facing either of these issues should consult their legal counsel.

15.5.1 Language. The EEOC has promulgated National Origin Discrimination Guidelines. 29 C.F.R. §§ 1606.1 to 1606.8. One of the guidelines discusses circumstances in which employers may and may not require that English be spoken on the job. Id. § 1606.7. This guideline provides that a “Speak English Only” rule that is applied at all times and at all places in the workplace presumptively violates Title VII. Id. § 1606.7(a). A more limited rule requiring employees to speak English at certain times and
certain places violates Title VII unless the employer can show that business necessity justifies the rule. *Id.* § 1606.7(b). A limited rule that meets the business necessity requirement (such as one related to health and safety concerns) will be acceptable only if the affected employee has notice of it. *Id.* § 1606.7(c). Regardless of the permissibility of such a rule during work hours, an employer should not restrict employees to the English language during lunch or break periods.

The Ninth Circuit has limited the EEOC rule with respect to bilingual employees. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993). In *Spun Steak*, the court held that employees fluent in English and Spanish did not suffer harm when they were required to speak English on the job, absent other evidence of discriminatory behavior or unequal enforcement. *Id.* at 1489. Entities that serve the public, however, may have to take different considerations into account when dealing with bilingual employees. The Arizona Constitution requires that English be the exclusive language used by government representatives in official actions, but it also allows for unofficial communication in other languages. *Ariz. Const. art. XXVIII, § 5.* This allowance was made in response to the Arizona Supreme Court’s 1998 holding that restricting non-English speakers’ ability to seek and obtain information and services from the government is unconstitutional. *Ruiz v. Hull*, 191 Ariz. 441, 459, 957 P.2d 984, 1002 (1998), *cert. denied*, 525 U.S. 1093 (1999). Because many bilingual state employees can serve an important role in facilitating non-English speaking residents’ efforts to communicate with the government, agencies should exercise caution concerning the use of language restrictions for staff.

Similarly, a requirement that an employee speak English not accented by a “foreign” pronunciation should be scrutinized for disparate impact under 29 C.F.R. § 1606.6(b)(1). A foreign accent that does not interfere with a worker’s ability to perform his or her duties is not a legitimate justification under Title VII for an adverse employment decision. *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984). But see *Fragante v. City of Honolulu*, 888 F.2d 591, 598-99 (9th Cir. 1989) (upholding a decision not to hire an individual of Filipino national origin as a clerk at an information counter where his accent prevented effective communication with the public).

**15.5.2 Alienage.** If a state agency excludes from employment non-citizens who have valid work authorizations, it must ensure that the decision does not have the effect of discriminating against applicants based on national origin. 29 C.F.R. § 1606.5(a). The agency must also comply with the Equal Protection Clause of the United States Constitution. A state agency may exclude a resident alien from employment based on the employee’s need to formulate, execute, or review public policy in the position at issue, but not based on economic costs. Compare, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 445-46 (1982) (upholding exclusion of resident aliens from employment as peace officers); *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (invalidating an exclusion of all resident aliens from employment in the competitive civil service for the purpose of reducing costs).
The Privileges and Immunities Clause of the United States Constitution also limits state rules that exclude out-of-state residents from employment. See, e.g., Hicklin v. Orbeck, 437 U.S. 518, 534 (1978) (invalidating hiring preference for Alaska residents in the oil and gas development area). In addition, the Immigration Reform and Control Act of 1986, as amended, restricts the employment of undocumented aliens, but prohibits discrimination based on a person’s citizenship status or national origin and provides remedies for such discrimination. See 8 U.S.C. §§ 1324a(a), 1324b(a), 1324b(b).

Similarly, the Legal Arizona Workers Act prohibits knowing or intentional employment of unauthorized aliens, A.R.S. §§ 23-212(A), -212.01(A), but also prohibits the investigation of unauthorized alien employment if that investigation is pursuant to a complaint “based solely upon race, color or national origin.” See A.R.S. §§ 23-212(B), -212.01(B). The Supreme Court held that the Immigration Reform and Control Act does not preempt the Legal Arizona Workers Act. Chamber of Commerce v. Whiting, 131 S.Ct. 1968, 1987 (2011).

15.6 Religious Discrimination. It is unlawful to discriminate against a person because of his or her religion. Title VII and the Arizona Civil Rights Act also require an employer to accommodate the religious beliefs and practices of its employees. Making decisions about religious practices and beliefs as they affect the workplace requires the decision maker to consider factors different from those involved in other Title VII claims.

The EEOC has promulgated Religious Discrimination Guidelines, 29 C.F.R. §§ 1605.1 to 1605.3 to provide guidance. The following general principles govern an employer's duty to accommodate employees' religious beliefs and practices:

1. An employer is required to do more than treat persons of all religions in the same way. An employer is required to reasonably accommodate an employee's religious practice and belief if it can do so without undue hardship. 42 U.S.C. § 2000e(j); A.R.S. § 41-1461(13).

2. An employer has a duty to reasonably accommodate and not to discriminate not only with respect to religious beliefs, but also with respect to religious practices. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2; A.R.S. § 41-1461(13).

3. A religious belief or practice includes a moral or ethical belief as to what is right and wrong that is sincerely held with the strength of traditional religious views. 29 C.F.R. § 1605.1 (following the standard of United States v. Seeger, 380 U.S. 163 (1965)). An atheist employee may be protected. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144-45 (5th Cir. 1975). Unless the employee’s claimed belief or religious practice is bizarre, the State may not inquire into its sincerity. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715-16 (1981).
4. An employer's duty to accommodate a religious practice arises only if the accommodation does not impose an undue hardship. The duty does not require an employer to incur more than minimal costs or to take actions such as altering a seniority system or involuntarily transferring other employees. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). The employer is not required to accept an employee's suggested accommodation, but only to offer a reasonable one that removes the conflict. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). However, speculative future difficulties do not constitute undue hardship. "[The] mere possibility that there would be an unfulfillable number of additional requests for similar accommodations by others cannot constitute undue hardship." *Opuku-Boateng v. California*, 95 F.3d 1461, 1474 (9th Cir. Cal. 1996). "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of ‘actual imposition on co-workers or disruption of the work routine.’" *EEOC v. Alamo Rent-A-Car L.L.C.*, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006).

An employer must show that it made an effort to reasonably accommodate, offered a reasonable accommodation that would eliminate the religious conflict, or that it would have been an undue hardship to accept the employee’s request. *Opuku-Boateng*, 95 F.3d at 1467. Reasonable accommodations may include schedule changes, leaves, or transfers. An employer's duty to accommodate also includes attire and grooming practices, but safety issues are considered. See, e.g., *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that religious requirement not to shave could not be accommodated because of safety reasons). An employer's proposal to allow an employee to wear a religious head covering only when not interacting with clients is not a reasonable accommodation. *Alamo Rent-A-Car L.L.C.*, 432 F. Supp. 2d at 1013.

If the employer is a governmental entity or if it engages in state action, it must consider the interplay among the First Amendment to the United States Constitution; article II, section 12 of the Arizona Constitution; and state and federal provisions that require employers to reasonably accommodate religious beliefs and practices. An employer is not required to accommodate an employee’s desire to impose his religious beliefs on his coworkers, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004), and the First Amendment does not protect such activities, *Bodett v. COXCOM, Inc.*, 366 F.3d 736, 748, 1007 (9th Cir. 2004); see also Ariz. Const. art. II, § 6 ("every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right"). Thus, the State, as an employer, has the right and the duty to prevent religious proselytizing by both coworkers and supervisors.
Decision makers facing problems that involve preferring or disadvantaging one religion over another or a religious institution over a nonreligious entity or that involve the sincerity of or the need to accommodate a religious belief or practice should consult their legal counsel.

15.7 **Sex Discrimination.** Sex discrimination violates Title VII and the Arizona Civil Rights Act. Claims of sex discrimination may be analyzed in any of three ways: facial discrimination, disparate treatment, or disparate impact.

The EEOC has promulgated Sex Discrimination Guidelines. 29 C.F.R. §§ 1604.1 to 1604.11. These Guidelines recognize that facial discrimination charges may be defended on the grounds that sex is a bona fide occupational qualification. *Id.* § 1604.2; see also A.R.S. § 41-1463(G)(1). The EEOC interprets this defense very narrowly, recognizing that excluding one sex is appropriate only under very limited circumstances, such as when an actor must be of one sex to preserve a production’s authenticity. 29 C.F.R. § 1604.2(a)(2).

The Guidelines indicate that an employer cannot establish that sex is a bona fide qualification when its defense is based on assumptions about comparative employment characteristics of women (such as the assumption that women experience a higher turnover rate than men), when it is based on stereotypes about the sexes (such as the assumption that women lack aggressiveness), or when it is based on the preferences of the employer, coworkers, clients, or customers. *Id.* § 1604.2(a).

15.7.1 **Pregnancy/Maternity Discrimination.** Congress amended Title VII in 1978 to define sex discrimination to include discrimination based on pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e(k). Although the Arizona Civil Rights Act ("ACRA") did not subsequently undergo a similar change, Arizona courts have held that discrimination based on pregnancy and pregnancy-related conditions is sex discrimination prohibited by state law, including A.R.S. § 41-1463(B) of the ACRA. *See, e.g., Broomfield v. Lundell*, 159 Ariz. 349, 353, 767 P.2d 697, 701 (App. 1989) (superseded by statute on other grounds); *Godfrey v. Indus. Comm’n of Arizona*, 124 Ariz.153, 157, 602 P.2d 821, 825 (App. 1979).

A real barrier for women exists when positions for which they have applied are closed because of a pending pregnancy or a related maternity leave. This practice is prohibited and on its face violates Title VII. 42 U.S.C. § 2000e-2; see also A.R.S. § 41-1463(E).

Employers are required to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery the same as they do all other temporary disabilities. *See 42 U.S.C. § 2000e(k); 29 C.F.R. § 1604.10.* Employers must apply policies and practices concerning the commencement and duration of leave, the availability
of extensions, the accrual of seniority and other benefits, and reinstatement and payment under any health or disability insurance or sick leave plan to disabilities due to pregnancy-related conditions on the same terms and conditions as they apply to other disabilities. 29 C.F.R. § 1604.10(b). Nevertheless, an employer may opt to provide greater benefits to pregnant employees than it does to nonpregnant employees without violating the discrimination provisions. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 287 (1987); Wimberly v. Labor & Indus. Comm’n, 479 U.S. 511, 522 (1987). For example, an employer may opt to provide leave and reinstatement benefits to pregnant employees when it does not provide these benefits to nonpregnant employees or to provide medical coverage for pregnancy-related expenses during an exclusion period when it does not similarly waive the exclusion for nonpregnancy-related preexisting conditions. See Appendix to 29 C.F.R. § 1604—Questions and Answers on the Pregnancy Discrimination Act.

Although an employer’s leave policy may generally limit the amount of leave that an employee may take, application of the policy to pregnant women based on pregnancy-related conditions may nevertheless constitute discrimination. Insufficient leave policies (typically less than six weeks) that adversely affect pregnant employees and for which there is no business necessity are illegal. See 29 C.F.R. § 1604.10(c). When making decisions about leave for pregnancy or maternity-based conditions, the employer must also consider the requirements of the Federal Family Medical Leave Act, 29 U.S.C. § 2611.

15.7.2 Sexual Harassment. Beginning in approximately 1976, some courts identified sexual harassment as a form of sex discrimination, but it was not until 1986 that the Supreme Court first dealt definitively with the issue. At that time, the EEOC had listed the following elements of a cause of action for sexual harassment:

[U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) 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.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a).

In Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 72-73 (1986), the Court approved these Guidelines and recognized that a sexually hostile environment may violate Title VII even when no specific economic or monetary harm results. The Court
also held that determining whether sexual harassment has occurred turns on whether the alleged victim indicated by conduct that the alleged sexual advances were welcome, not whether participation in the sexual conduct was voluntary. *Id.* at 68.

In 1992, the Court held that for a sexually hostile environment to be actionable under Title VII, it must be both objectively and subjectively offensive, *i.e.*, one that a reasonable person would find to be hostile or abusive and one that the victim in fact perceived to be so. In making this determination, the fact finder should consider the totality of the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1992).

*Meritor* and *Harris* accepted the quid pro quo and hostile environment analyses that lower courts had adopted in dealing with sexual harassment cases. Under those theories, an employer was liable for quid pro quo harassment when the employee proved her reaction to the harassment affected tangible aspects of her compensation or the terms, conditions, or privileges of her employment; in hostile environment cases, the employer was liable when the employee’s working conditions were changed and, as a result of the harassment, she was compelled to work in a hostile, intimidating, and offensive environment. Employers were liable for quid pro quo harassment if even one incident was proven, while liability under a hostile environment theory arose only when the conduct was severe or pervasive.

Subsequently, the Supreme Court held that same-sex sexual harassment is a form of sexual harassment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

15.7.2.1 Hostile Work Environment Sexual Harassment.

In *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), the Supreme Court applied *respondeat superior* principles to refine possible grounds for an employer’s liability for hostile work environment sexual harassment. If harassment is established and the harasser is so highly ranked to be considered an alter-ego for the company, the employer has no defense to liability. *Ellerth*, 524 U.S. at 758. If harassment is established and the harasser is a supervisor, the employer has no defense to liability if the employee suffers tangible harm, such as discharge, demotion, or undesirable reassignment, as a result of the harassment. *Faragher*, 524 U.S. at 808. If the employee has not suffered tangible harm but has been sexually harassed by a supervisor, then the employer may avoid liability if it can prove (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) that the employee unreasonably failed to take advantage of any
preventive or corrective opportunities that the employer provided or to otherwise avoid harm. *Ellerth*, 524 U.S. at 765.

Neither *Ellerth* or *Farragher* dealt with coworker sexual harassment. However, lower courts consistently have held that an employer is liable for the sexual harassment of an employee by a nonsupervisory coworker when the employer knew or reasonably should have known that the harassment was occurring and failed to take preventive or curative measures. See, e.g., *Dawson v. Entek Int'l*, 630 F.3d 928, 938 (9th Cir. 2011); see also 29 C.F.R. § 1604.11(f). In addition, courts have held employers liable for the sexual harassment of employees by third parties when the employer was aware of the harassment and failed to respond appropriately. *Lockard v. Pizza Hut*, 162 F.3d 1062, 1072-73 (10th Cir. 1998).

In determining whether hostile work environment sexual harassment has occurred, the fact finder must evaluate the offensiveness of the conduct from the perspective of a reasonable victim of the same sex as the complainant. *Oncale*, 523 U.S. at 81; *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). In this regard, offensive conduct does not need to be expressly sexual to establish a claim for sexual harassment; the issue is whether the alleged harasser’s behavior affected employees of one sex more adversely than it affected employees of the other sex. *EEOC v. National Educ. Ass’n*, 422 F.3d 840, 845 (9th Cir. 2005). The fact finder also must ensure that the victim is not left in a worse position as a result of making the complaint. See *Ellison*, 924 F.2d at 882. Finally, in deciding whether to take action, an employer must balance the need to take effective action against the potential liability for terminating an individual accused of unlawful sexual harassment. See *Snipes v. United States Postal Serv.*, 677 F.2d 375, 377-78 (4th Cir. 1982). To justify terminating an alleged harasser, an employer must demonstrate that it had a reasonable basis for believing that the alleged harasser engaged in the unlawful conduct and that termination was appropriate under the circumstances. See id. at 376-78.

**Summary of hostile work-environment sexual harassment claims and defenses:**

<table>
<thead>
<tr>
<th>If the harasser is a:</th>
<th>Then the employer is liable for the harassment when</th>
<th>Unless the employer can show that</th>
</tr>
</thead>
<tbody>
<tr>
<td>person who is high-ranking enough to be considered the alter ego of company or public entity</td>
<td>harassment occurs.</td>
<td></td>
</tr>
<tr>
<td>supervisor</td>
<td>harassment occurs and results in a negative employment action.</td>
<td></td>
</tr>
</tbody>
</table>
supervisor

harassment occurs and causes a hostile working environment.

it took reasonable steps to prevent and to quickly stop harassing behavior and the employee unreasonably failed to take advantage of the employer's efforts to prevent or stop the harassing conduct or to avoid harm.

coworker

the employer knew or should have known about the discrimination.

it took immediate and appropriate corrective action.

nonemployee (e.g., customer, student, sales personnel)

the employer knew or should have known about the discrimination.

it took immediate and appropriate corrective action.

15.7.2.2 Quid Pro Quo Sexual Harassment.

Claims of quid pro quo sexual harassment follow the *McDonnell Douglas* model for proving inferential disparate treatment claims. *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995). In order to establish a prima facie case of quid pro quo sexual harassment, the evidence must show that the employer “explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon [the employee’s] acceptance of sexual conduct.” *Id.* If the employee establishes a prima facie case of quid pro quo sexual harassment, then the employer must articulate a legitimate, non-discriminatory reason for its conduct. If the employer meets this burden, the employee can still prevail if the evidence as a whole demonstrates that the employer’s explanation is pretextual and that it is more likely than not that the real reason for the employment decision (e.g., undesirable reassignment, termination) was that the employee refused the sexual advances of the employer. *Id.* at 1478-79.

15.8 Equal Pay Discrimination. The federal Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits an employer from paying an employee of one sex less than it pays an employee of the opposite sex when the two perform substantially equal work involving substantially equal skill, effort, and responsibility under substantially similar working conditions. The employer may defend against an alleged violation by proving that the wage differential is based on its seniority system, merit system, piecework system, or any factor other than sex. 29 U.S.C. § 206(d)(1). These four exclusive affirmative defenses have been incorporated into the Arizona Civil Rights Act. *Higdon v. Evergreen Intl Airlines, Inc.*, 138 Ariz. 163, 165, 673 P.2d 907, 909 (1983); see also A.R.S. § 41-1463(I)(1).
The Equal Pay Act does not require that an employer have any minimum number of employees to be subject to its requirements. 29 U.S.C. § 206(d); see also 29 U.S.C. § 203(d), (e) (defining "employer" and "employee"). In contrast, the Arizona Civil Rights Act only applies to employers that have fifteen or more employees. A.R.S. § 41-1461(5), (6).

Once an employee has established that the employer pays him or her less than it pays a member of the opposite sex for substantially equal work, the burden shifts to the employer to show that the wage differential is justified under one of the Equal Pay Act's four exceptions. *Higdon*, 138 Ariz. at 166, 673 P.2d at 910. To establish the "factor other than sex" defense, an employer must demonstrate that use of the factor is reasonable in light of employer's stated purpose as well as its other practices. *Id*.

Under the federal scheme, violations that occur during different pay periods constitute separate violations. *Soler v. G & U Inc.*, 86 F.R.D. 524, 528 (S.D.N.Y. 1980) (interpreting 29 U.S.C. § 255(a)). Where liability is found, the employer is liable for double the wage differential. 29 U.S.C. § 216(b). An employee has two years in which to bring a claim under the Equal Pay Act. 29 U.S.C. § 255. The Arizona Civil Rights Act, however, imposes a 180-day filing requirement for a discrimination charge, A.R.S. § 41-1481(A). It also requires an employee to file a lawsuit based on disparity in pay within one year from the date of filing the discrimination complaint. A.R.S. § 41-1481(D). There are exceptions to these time periods for continuing systemic violations.

The employer may not lower the wage of a more highly paid employee in response to this type of claim. 29 U.S.C. § 206(d)(1). Claims for unequal wages may also be brought under Title VII.

15.9 Lilly Ledbetter Fair Pay Act. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), the Supreme Court held that an employer's decision with respect to setting pay is a discrete act of discrimination, and that the relevant period of limitations begins to run when the act first occurs. The Court held that a plaintiff who alleges that she is paid less today than her male colleagues solely because, during an earlier period of time (outside of Title VII's limitations period), she was denied appropriate salary increases on account of her sex, does not state a claim cognizable under Title VII. More particularly, the Court held that each paycheck a plaintiff receives that she asserts is less than it would be but for past discrimination does not constitute an actionable wrong. *Id* at 628.

Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. The Ledbetter Act provides that discrimination in compensation occurs when either (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to a discriminatory compensation decision or other practice; or (3) an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. \textit{Id.} § 2000e-5(e)(3)(A). The Act applies not only to direct compensation decisions but also to any other practice that in whole or part impacts wages, benefits, or other compensation. \textit{Id.}

The Ledbetter Act deems each paycheck issued pursuant to a discriminatory compensation decision or pay structure an independent, actionable act. \textit{Id.} It applies to all claims of discrimination in compensation that are or were pending on or after May 28, 2007. Ledbetter Act, sec. 6. Thus, the Ledbetter Act effectively restarts the statute of limitations for any claim that present compensation would be more but for past discrimination with the issuance of each paycheck.

However, the Supreme Court has held that the Ledbetter Act does not apply to employer actions that were not discriminatory at the time at which they were taken, but were later made unlawfully discriminatory through legislation. \textit{AT&T Corp. v. Hulteen}, 129 S. Ct. 1962, 1972-73 (2009). In \textit{Hulteen}, an employer calculated seniority differently for men and women based upon whether medical leave had been taken for pregnancy. \textit{Id.} at 1967. When such disparate calculation was made illegal, the employer amended its calculation procedure to account for the new legislation but did not retroactively amend the seniority calculations made prior to the legislation. \textit{Id.} The Supreme Court held that no retroactive amendment is necessary if the calculation was lawful at the time at which it was made and the calculation was part of a “bona fide seniority system.” \textit{Id.} at 1967-69.

\textbf{15.10 Harassment.} Harassment cases most often involve sexual harassment, but may also involve color, national origin, age, religion, or disability. In general, these harassment claims are analyzed under the same legal standard. See EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, available at \textit{www.eeoc.gov/policy/docs/harassment.pdf}. To constitute discrimination, the harassing conduct must be unwelcome and either severe or pervasive enough to interfere with an individual’s work performance or to create an intimidating, hostile, or offensive working environment. \textit{See, e.g., Vasquez v. Cnty. of Los Angeles}, 349 F.3d 634,642 (9th Cir. 2003) (harassment based on race), \textit{Kang v. U. Lim America, Inc.}, 296 F.3d 810, 817 (9th Cir. 2002) (harassment based on national origin).

\textbf{15.11 Age Discrimination.} The federal Age Discrimination in Employment Act (ADEA) prohibits age-based discrimination against employees forty years of age or older. 29 U.S.C. §§ 621 to 634. The Arizona Civil Rights Act mirrors that provision. A.R.S.
§ 41-1465. Because the ADEA prohibits discrimination based on age rather than on class membership, the appropriate inquiry under it is whether a younger person (who may still be over 40) was treated more favorably than a significantly older person, not whether one person is in the protected age category and the other is not. O'Connor v. Consol. Coin Caterers, 517 U.S. 308, 311-12 (1996). The EEOC has published guidelines on age discrimination. 29 C.F.R. §§ 1625.1 – .32.

In addition to prohibiting actual age discrimination, the ADEA makes it unlawful for an employer to print or publish any notice or advertisement relating to employment that reflects a preference, limitation, specification, or discrimination based on age. 29 U.S.C. § 623(e).

An employer may violate the ADEA through neutral policies that have a disparate impact on older employees as well as through practices that are facially discriminatory. For example, an employer that prohibits retired employees from returning to work may be discriminating against older workers because there is a close correlation between age and retirement—the factor upon which the discrimination is based. E.E.O.C. v. Local 350, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992). Other policies that may negatively impact older employees include a requirement of a “recent” educational degree and a prohibition on employing individuals who are receiving social security benefits. Absent a justification of business necessity, a neutral policy that affects older employees more than younger ones is impermissible.

If an employer does set an age limitation for employment, the limitation must be justified as a bona fide occupational qualification. 29 U.S.C. § 623(f)(1); A.R.S. § 41-1463(G)(1). To justify an age cap, the employer must show (1) that having employees younger than that age in that position is reasonably necessary to the essence of the employer's business and (2) that the employer has a factual basis for believing that all or substantially all persons over the set age are unable to safely and efficiently perform that job or that it is impracticable to make determinations of ability on an individual basis. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236-37 (5th Cir. 1976). The Ninth Circuit has adopted the Usery standard. EEOC v. Santa Barbara County, 666 F.2d 373, 376 (9th Cir. 1982); see also, EEOC v. L.A. County, 706 F.2d 1039, 1042-1043 (9th Cir. 1983).

Firefighters and law enforcement officers whom the State or the State’s political subdivisions employ are subject to special coverage. It does not violate the ADEA for a State or political subdivision to refuse to hire or to discharge a person because of the person's age if "the individual has attained the age of hiring or retirement in effect under applicable . . . law on March 3, 1983." 29 U.S.C. § 623. A 1996 amendment to the ADEA permits state or local entities to enact new legislation (1) establishing a maximum age for hiring law enforcement officers and firefighters, as long as the maximum age for hiring is not lower than the one set on March 3, 1983, and (2) establishing a new age for mandatory
retirement or discharge of law enforcement officers and firefighters as long as that age is not less than fifty-five. If the state law sets an age other than fifty-five for discharge or retirement, the legally permissible age will be the older of age fifty-five or the age set out in a state law enacted after September 30, 1996. Id. § 623(j)(1). Any such age-based hiring or discharge must be made pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the ADEA’s purposes. Id. § 623(j)(2). The Arizona Civil Rights Act has not contained an age exemption since 1994, and it covers any person forty years of age or over. A.R.S. § 41-1465. Therefore, state law age limitations on the hiring, discharge, and forced retirement of firefighters and law enforcement officers must be justified as bona fide occupational qualifications.

Both the Arizona Civil Rights Act and the ADEA prohibit mandatory retirement based on age. 29 U.S.C. § 623(f)(2); A.R.S. § 41-1463(G)(4)(b). Since the passage and subsequent amendment of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §§ 621, 623, 626, 630, however, the ADEA’s exemption is phrased in different terms than the state law exemption. Among other things, the OWBPA prohibits discrimination against older workers in all employee benefits, except when significant cost considerations justify age-based reductions in employee benefit plans. Id. § 623(f)(2). The OWBPA also requires an employer to give its employees notice and to follow detailed steps if it wishes the employees to waive ADEA rights in return, for instance, for severance pay or an enhanced benefit package. Id. § 626(f). Employee benefits law, including the portion that governs what age-based distinctions may be permissible, is highly complex and specialized. Only those knowledgeable in that law should make decisions in this area.

15.11.1 Waivers. Older workers can waive the protections that the OWBPA offers them. For such a waiver to be valid, it must be knowing and voluntary. Id. § 626(f)(1). An agreement that an employee will not bring an action under the ADEA is enforceable if it meets the following requirements:

1. It is part of a written agreement, id. § 626(f)(1)(A);
2. It specifically refers to rights and claims under the ADEA, id. § 626(f)(1)(B);
3. "[T]he individual does not waive rights or claims that may arise after the date [of the agreement]," id. § 626(f)(1)(C);
4. The employee receives valuable consideration for the waiver in addition to that which the employee would be entitled to receive, id. § 626(f)(1)(D);
5. The employee "is advised in writing to consult with an attorney," id. § 626(f)(1)(E);
6. The employee is given at least twenty-one days to review the agreement, \textit{id. § 626(f)(1)(F)};  

7. The employee is given at least seven days after signing the agreement to revoke it, \textit{id. § 626(f)(1)(G)};  

8. If the agreement is made during a layoff, it meets the additional requirements for waivers made during layoffs, \textit{id. § 626(f)(1)(H)}.  

An agreement that the employee will not sue the State under the ADEA is not enforceable unless these requirements have been met. An agreement that purports to waive an individual’s ADEA rights but that does not strictly comply with these requirements is not enforceable and will not bar a subsequent lawsuit—even if the complainant has retained the consideration that the agreement specified. \textit{Oubre v. Entergy Operations}, 522 U.S. 422, 427-28 (1998).  

As with Title VII, employers cannot rely on pre-1990 opinions interpreting the ADEA—particularly those involving benefits or waivers of rights—without checking subsequent legislation.  

\textbf{15.12 Discrimination Based on Disability.} Employees are protected from discrimination based on disability by state and federal law. Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213, is the federal law that prohibits discrimination in employment against individuals with disabilities. The state law, the Arizona Civil Rights Act (“ACRA”), was amended in 1994 to include disability as a protected category. The ADA was intended to be consistent with Title V of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to 796, so that agencies that complied with that law would also be in compliance with the ADA. The ADA sets the \textit{minimum} level of protection afforded to individuals with disabilities; other state or federal law may offer greater protections. 29 C.F.R. § 1630.1(c).  

The ADA prohibits all governmental entities from discriminating in employment against individuals with physical or mental disabilities. The ADA also covers private employers with fifteen or more employees. Though Title II of the ADA covers discrimination in employment by governmental entities, the regulations that the EEOC promulgated for Title I are used to interpret Title II’s employment provisions. These Title I regulations are at 29 C.F.R. §§ 1630.1 to 1630.16. All references in this section are to those regulations, and further information about compliance with the ADA’s employment discrimination provisions should be obtained by referring to the regulations.  

Employers may not discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of
employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Discrimination also includes failure to provide reasonable accommodations for known disabilities (see discussion below). A “qualified individual with a disability” is a person who has a disability and who, with or without reasonable accommodation, can perform the essential functions of the job. Id. § 12111(8).

15.12.1 Defining Disability.

The ADA defines disability as:

1. a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
2. a record of such an impairment; or
3. being regarded as having such an impairment.

Id. § 12102(1); 29 C.F.R. § 1630.2(g).

Arizona's definition of "disability" mirrors the federal definition. A.R.S. § 41-1461(4).

In 2008, Congress passed the Americans with Disabilities Act Amendment Act ("ADAAA") to reverse the effect of several Supreme Court cases that had narrowed the definition of disability in the years since the passage of the ADA. The ADAAA makes it clear that the definition of disability is to be construed broadly. In 2010, the ACRA was amended to reflect the ADAAA's inclusive understanding of “disability.” See A.R.S. § 41-1461(9).

In analyzing whether a person has an “actual disability,” in other words, whether a person is disabled under the first part of the disability definition, an employer must consider the effect of the individual’s impairment upon a major life activity. Bragdon v. Abbott, 524 U.S. 624, 637 (1998). Major life activities include such things as walking, sleeping, speaking, breathing, working, concentration, engaging in sex, reproduction, the operation of major bodily functions, including the immune system and endocrine system, and interacting with others. A.R.S. § 41-1461(9)(a). They are basic activities that the average person in the population can perform with little or no difficulty. McAlindin v. Cnty. of San Diego, 192 F.3d 1226, 1233 (9th Cir. 1999), opinion amended, 201 F.3d 1211 (2000); 29 C.F.R. § 1630.2(i).

The ADAAA's explicit definition of major life activities makes it clear that diseases such as diabetes and cancer are included in the definition of disability. See 42 U.S.C. § 12102(2). Whether an impairment substantially limits a major activity does not take into account the effects of mitigating measures such as medication. In other words, whether a

15-18 Revised 2011
person has a disability depends on whether that impairment would substantially limit a major life activity without regard to whether mitigating measures eliminate or reduce the impact of the impairment. 29 C.F.R. § 1630.2(j)(vi). In addition, an impairment that is episodic (such as epilepsy) or in remission (such as cancer) is a disability if it would substantially limit a major life activity when active. Id. § 1630.2(j)(vii). However, an impairment that is temporary or non-chronic, such as a seasonal flu or a broken bone that is expected to heal completely, does not qualify as a disability.

An individual may be disabled under the ADA and the ACRA where s/he has a record of disability. 42 U.S.C. § 12102(1); A.R.S. § 41-461(4)(b). In this situation, the individual had an impairment that substantially limited one or more major life activity at some point in the past, but is no longer substantially limited. See 29 C.F.R. § 1630.2(k)(i). An individual might also meet this prong of the definition if s/he was once misclassified as having a substantially limiting impairment. Id. An employer’s knowledge of the past impairment is not related to whether the person meets the definition of disabled under this prong (though absence of such knowledge would be relevant to whether the employment made a discriminatory employment decision).

An individual may be “regarded as” having a disability when his or her employer takes an action prohibited by the ADA and the ACRA based on an individual’s impairment or an impairment the employer believes the individual has. 42 U.S.C. § 12102(1); A.R.S. § 41-1461(4)(c). For instance, if an employer is aware that an employee takes an anti-seizure medication and terminates the employee, the employer has regarded the employee as having a disability, even if the employer does not know the impairment for which the medication is being used. An employer need not provide a reasonable accommodation for an individual who meets the definition of disabled under this prong.

If an individual meets one of these three definitions of disability, an employer must consider whether the individual is “qualified” under the ADA and the ACRA. Disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania. 29 C.F.R. § 1630.3(d).

15.12.2 “Qualified Individual” with a Disability.

The ADA protects a qualified individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8). A person is “qualified” if s/he has the requisite education, skills, experience, licenses, etc. required for the position. 29 C.F.R. § 1630.2(m).

For example: Employer A wants to hire a nurse practitioner to provide specialized nursing care. An individual who has
received her certification as a nurse practitioner, who meets the experience requirements of the job, and who has excellent references from former employers applies for the job. She has breast cancer that is in remission. She is a "qualified" individual with a disability.

The ADA prohibits discrimination based on stereotypes or impressions about what individuals with disabilities can or cannot do. See Bragdon v. Abbott, 524 U.S. 624, 626 (1998). It requires an employer to make employment decisions based on an individual's qualifications and abilities in light of the specific duties of the job. Employers must avoid making decisions based on stereotypes about disabilities or other fears about an individual's disability. For instance, an employer may not refuse to hire a qualified individual with bipolar disorder because of fear that the individual may require hospitalization in the future or because the employer believes that individuals with bipolar disorder may become violent.

A person who is currently engaging in the use of illegal drugs is not a qualified individual with a disability. 29 U.S.C. § 1630.3(a). However, a person who has successfully rehabilitated and is no longer engaging in the illegal use of drugs is considered a qualified individual with disability if s/he meets the other requirements. Id. § 1630.3(b).

The ADA and the ACRA also prohibit discrimination against individuals who are associated with others who have disabilities, such as individuals who volunteer at a hospice or persons who have individuals with disabilities living with or dependent upon them. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8.

15.12.3 Defenses Available to Employers.

An employer who engages in activity that would otherwise violate the ADA and the ACRA may have a defense in certain situations. If the adverse employment decision was made because of a "legitimate, non-discriminatory reason," the employer will not be liable. 29 C.F.R. §1630.15(a). For instance, if an individual with a disability is terminated and the employer can establish that the termination was due to a violation of policies and procedures (and the termination would have occurred whether the individual had a disability or not), the employer will have established that there was a legitimate, non-discriminatory reason for the termination.

Additionally, an employer may utilize qualifications standards that screen out or tend to screen out individuals with disabilities if those qualification standards are "job-related and consistent with business necessity." 29 C.F.R. § 1630.15(b)(1). An employer who requires as a job qualification that an employee meet an otherwise applicable federal
safety regulation does not have to justify enforcing the regulation. See Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 577-78 (1999). However, application of the federal safety standard must be an essential function of the position. For instance, an employer cannot rely on DOT driving standards to deny employment where they are inapplicable to the type of vehicle the employee actually drives. See Bates v. United Parcel Servs., Inc., 511 F.3d 974, 994 (9th Cir. 2007).

An employer may make an otherwise discriminatory employment decision if the individual poses a direct threat to the health or safety of him/herself or others where the direct threat cannot be eliminated by a reasonable accommodation. 42 U.S.C. § 12113(b). The determination that an individual poses a "direct threat" must be based on an individualized assessment of the employee's or applicant's present ability to safely perform the job's essential functions and on valid medical analyses or other objective evidence. It must be made on a case-by-case basis and must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of the particular disability. See, e.g., Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999). Employers should take care to explore whether a reasonable accommodation exists that would eliminate the threat or enable the employee to meet the qualification standard before taking an adverse employment action against an individual with a disability.

15.12.4 Reasonable Accommodation. The ADA and the ACRA define discrimination to include failure to provide "reasonable accommodation" to a qualified individual with a disability. A.R.S. § 41-1463(F)(4). An employee should be reasonably accommodated if the accommodation is necessary to give the individual the same opportunity to perform the job or the same benefits of employment as an individual without disabilities. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA (October 17, 2002) at www.eeoc.gov/policy/docs/accommodation.html. A "reasonable accommodation" may include but is not limited to the following:

1. An accommodation that is required to ensure equal opportunity in the application process, such as appropriate adjustment or modification of examinations, training materials, or policies;

2. An accommodation that allows the employee to perform the essential functions of the position held or desired, such as part-time or modified work schedules; acquisition or modification of equipment or devices; or the provision of qualified readers or interpreters;

3. An accommodation that enables the employee to enjoy the same benefits or privileges of employment that are enjoyed by other employees without
disabilities, such as modification of break rooms, lunch rooms, training rooms, etc.;

4. Job restructuring by reallocating or redistributing nonessential or marginal job duties; and

5. Reassignment or transfer to another vacant position when accommodation within the individual's current position would pose an undue hardship on the employer (though reassignment is not required if it would violate the terms of a collective bargaining agreement).

42 U.S.C. §§ 12111(9), 12112(b)(5); 29 C.F.R. § 1630.2(o)(2). For examples and ideas about accommodations that exist for particular jobs and specific disabilities, employers may consult the U.S. Department of Labor Job Accommodation Network at http://askjan.org/.

An employer must accommodate the known disabilities of a qualified applicant or employee. 29 C.F.R. § 1630.9. If the disability or the need for accommodation is not obvious, an employer may request documentation to confirm a disability and the need for an accommodation. EEOC Enforcement Guidance on Reasonable Accommodation. Employers may not ask for all of the individual’s medical records and, if necessary to obtain medical records, should ask for a medical release that is limited to information about the nature of the impairment and the types of functional limitations it causes. Employers may ask that documentation be provided by an appropriate medical professional, which can include medical doctors, psychologists, therapists, nurses, and vocational rehabilitation specialists. EEOC Enforcement Guidance on Reasonable Accommodation, supra.

Accommodations must be made on an individual basis because the nature and extent of the impairment and the requirements of the job will vary in each case. An individual's need for an accommodation cannot enter into the decisions that an employer makes regarding hiring, discharge, promotion, or related matters unless the accommodation would impose an undue hardship upon the employer. 29 C.F.R. § 1630.9(b). A reasonable accommodation must be effective. In determining what accommodation(s) will be effective, an employer must engage in the “interactive process” with the employee. This means that the employer and the employee should engage in a dialogue to determine what type of accommodation is needed and whether alternative accommodations exist. The employer does not have to provide the accommodation sought by the individual, so long as the accommodation provided is effective. However, the employee/applicant is often the most knowledgeable person regarding what accommodation(s) would be effective.

An employer is not required to provide an accommodation to a qualified individual with a disability if providing the accommodation would be an undue hardship. 29 C.F.R.
§ 1630.2(p). "Undue hardship" means “significant difficulty or expense in, or resulting from, the provision of the accommodation.” Id. To determine whether an employer has demonstrated "undue hardship," the following factors must be considered:

- The nature and cost of the accommodation, taking into account any tax credits, deductions, or outside funding that may be available;
- the overall financial resources of the office or facility at which the accommodation would be provided, including the number of employees at that location;
- the overall financial resources of the covered entity (in other words, the entity that employs the individual), including the number of employees and the number of office or facility locations;
- the impact of the accommodation on the facility.

Id.

An employer that relies on the defense of "undue hardship" must demonstrate that it made all reasonable efforts to provide the needed accommodation, but was unable to do so. 42 U.S.C. § 12112(b). When analyzing a disability case, it is important not to rely on religious accommodation Title VII standards because the duty to provide reasonable accommodations under the ADA is higher. The ADA requires individualized assessment of reasonable accommodations. See Sections 15.12 to 15.12.4.

15.12.5 Medical Inquiries and the Confidentiality of Medical Information. In addition to prohibiting discrimination against persons with disabilities and requiring reasonable accommodations, the ADA prohibits employers from making medical inquiries or requiring physical examinations at the pre-offer stage of the selection process. 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13(a), 1630.14(a).

An employer may require a medical examination after it has made a job offer, but before the employee has begun working, if all employees are required to undergo the examination and the employer keeps the medical information confidential. 42 U.S.C. § 12112(d)(3). Employers cannot make medical inquiries or require medical examinations of current employees unless the examination or inquiry is job-related and is consistent with business necessity. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13(b),1630.14(b). Any information that the employer obtains as a result of a permitted medical inquiry or examination must be kept apart from its general personnel files as a separate, confidential medical record and may be made available only under very limited conditions. 42 U.S.C. § 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14(b), (c). The ADA creates a cause of action
for all job applicants and employees, disabled or not, who are injured by impermissible questions about their medical history. Griffin v. Steeltek, Inc., 160 F.3d 591, 594-95 (10th Cir. 1998). The EEOC has issued Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees under the ADA (July 26, 2000) available at www.eeoc.gov/policy/docs/guidance-inquiries.html.

15.12.6 Other Legislation Prohibiting Discrimination Against Persons with Disabilities. The Rehabilitation Act, which has been in effect since 1973, prohibits discrimination based on physical and mental disability. It applies to federal contractors and recipients of federal grants. 29 U.S.C. §§ 701 to 796. The State, as a federal contractor or recipient of federal grants, must comply with the Rehabilitation Act. The definition of disability is the same under the ADA and the Rehabilitation Act. 42 U.S.C. § 12102(1); 29 U.S.C. § 705(9).

15.12.7 Practical Pointers. To ensure compliance with the ADA’s requirements regarding employment decisions, the supervisor or manager should keep several things in mind:

1. Hiring decisions must be based on each applicant’s qualifications for a particular job.

2. If an employer has prepared a job description or advertisement as part of its recruitment process, that description or advertisement will be evidence of all physical, mental, or other qualifications for the job. Job descriptions should be updated periodically to ensure that they reflect the qualifications actually necessary for the job as it is being performed.

3. The obligation of reasonable accommodation begins with the recruitment process, continues throughout the individual’s employment, and includes not only job duties, but the benefits of employment as well. Where an accommodation is not obvious, an employer must engage in an interactive process with the applicant/employee to determine what accommodation(s) may be necessary.

4. The reasonable accommodation obligation may require an employer to treat a disabled employee differently from other employees so as to provide an accommodation that will afford the employee an equal opportunity to work and to enjoy the benefits of work.

5. Reasonable accommodation requires an individualized assessment of the nature and extent of an individual’s disability and an analysis of what kinds of accommodation will be most useful in permitting the individual to perform the
particular job in question. That information will frequently be most readily available from the individual. The ADA therefore requires the employer and the individual with a disability to engage in an interactive process.

6. An employer may not reject an individual with a disability for employment because of a concern that the individual will require an accommodation to perform the job.

7. After an employer provides a reasonable accommodation to an employee with a disability, the law presumes that the employer will treat the employee exactly as it does nondisabled employees with respect to benefits, opportunities, expectations, and other conditions of employment.

8. The prohibition against disability discrimination also forbids discrimination against those who have a disabled person living with or dependent upon them. This means that it is unlawful to refuse an individual employment because of concerns that the dependent with disabilities will increase the employer's costs of providing insurance or will distract the employee from his or her work.


“Genetic information” under GINA includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (i.e., an individual's family medical history). Id. § 2000ff(4).

GINA forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. Id. § 2000ff-1(a);
-4(a). Under GINA it is also illegal to harass a person because of his or her genetic information, or to retaliate against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. *Id.* § 2000ff-6(f).

It will usually be unlawful under GINA for an employer to get genetic information, unless it qualifies for one or more of six narrow exceptions:

- Inadvertent acquisitions of genetic information *e.g.*, a manager overhearing someone talking about a family member’s illness do not violate GINA.

- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.

- Genetic information may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws) where an employee is asking for leave to care for a family member with a serious health condition.

- Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information.

- Acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.

- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

*Id.* § 2000ff-1(b).

It is also unlawful for an employer to disclose genetic information about applicants or employees. *Id.* § 2000ff-5. Employers must keep genetic information confidential and in a separate medical file. *Id.* Genetic information may be kept in the same file as other medical information in compliance with the ADA. There are limited exceptions to this non-disclosure rule.

Employment discrimination based on the results of genetic testing has been prohibited under the Arizona Civil Rights Act since 1997. *See A.R.S.* § 41-1463(B)(3).
15.14 Intersectional Discrimination. Courts have recognized that discrimination may not be limited to separate race and sex categories, but rather may be based upon a combination of such categories. In *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994), the Ninth Circuit noted:

[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences. Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.

15.15 Retaliation. Retaliatory action by the employer that occurs after the complainant has engaged in protected conduct is illegal under Title VII, the ADEA, the ADA, the EPA, GINA and the Arizona Civil Rights Act. These statutes make it unlawful to take adverse action against any individual because that person has opposed an unlawful employment practice or has filed a charge or otherwise participated in an investigation, proceeding, or hearing pertaining to a discrimination complaint. *See, e.g.*, 42 U.S.C. § 2000e-3(a); A.R.S. § 41-1464. Both current and former employees are protected. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

An employee’s complaints about an employer’s treatment of others is considered protected activity, even if the complaining employee is not in the same protected class as the employees who allegedly suffered discrimination. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). It also is unlawful to retaliate against an employee because of the protected actions of someone closely related to or associated with the employee. *Thompson v. North Am. Stainless, L.P.*, 131 S. Ct. 863, 867-68 (2011) (firing employee because his fiancée filed an EEOC discrimination charge violates Title VII’s anti-retaliation provisions).

Employees are considered to have "opposed" an employment practice when they have opposed what they reasonably perceived to be unlawful discrimination. *Freitag v. Ayers*, 468 F.3d 528, 542 (9th Cir. 2006). Complaining employees must have a factual basis for reasonably believing that their employers engaged in unlawful discrimination within the meaning of the provisions. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). But employees need not prove that the conduct that they opposed in fact violated anti-discrimination provisions. *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988). An “adverse action” is any employer action that “well might have

However, claims alleging, for example, that the employer retaliated because an employee filed a workers' compensation claim, objected to nonpayment of overtime, reported Occupational Safety Health Association (OSHA) violations, or opposed other activities that fall outside the scope of the discrimination provisions are not proper retaliation claims under the discrimination provisions, absent other evidence of discrimination. See, e.g., Learned, 860 F.2d at 932 (suit for “excess damages” under industrial insurance statute that did not involve discrimination allegations not protected activity under Title VII). Remedies for retaliation not based on discrimination can be found in other statutes. See, e.g., A.R.S. § 38-532.

A common form of protected activity is an employee complaint to a supervisor or an affirmative action officer that an employer is engaged in an activity or practice that discriminates because of race or sex. See, e.g., Ray v. Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000) (making an informal discrimination complaint to a supervisor is protected activity). Other protected activities include filing a criminal assault complaint against a supervisor, EEOC v. Dinuba Med. Clinic, 222 F.3d 580, 586 (9th Cir. 2000); notifying a customer of EEOC charges and conclusions against the employer, Crown Zellerbach, 720 F.2d at 1013-14; and helping another employee file an EEOC charge, EEOC v. California Psychiatric Transitions, Inc., 725 F. Supp. 2d 1100, 1108 (E.D. Cal. 2010). However, an employee's conduct will not be protected if it seriously interferes with his or her job performance—that is, if it interferes to the point that the employee is no longer effective, Rosser v. Laborers' Int'l Union of N. Am., 616 F.2d 221, 223 (5th Cir. 1980), or the employee otherwise disrupts the employer's operation, for example, by surreptitiously copying confidential documents, O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 762-64 (9th Cir. 1996).

To establish a prima facie case of retaliation, the plaintiff must demonstrate that he or she engaged in protected activity; that the employer subsequently took adverse action; and that there was a causal connection between the protected activity and the adverse action. Freitag v. Ayers, 468 F.3d. 528, 541(9th Cir. 1997). Courts often will infer causation when the adverse action follows shortly after protected activity. See Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 507 (9th Cir. 2000) (discussing Ninth Circuit cases).

Once the plaintiff has established a prima facie case, the burden shifts to the employer to provide a legitimate reason for the adverse action. Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997). Once the employer articulates a legitimate, nondiscriminatory reason, the employee may still prevail by proving that the employer's
proffered reason is pretextual and that it is more likely than not that the real reason for the retaliatory action was the protected conduct. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

For more information, refer to the EEOC Compliance Manual section on retaliation. www.eeoc.gov/policy/docs/retal.html.

**15.16 Affirmative Action as a Component of a Voluntary Plan.** Many public agencies explicitly encourage minorities and females to apply for employment. This is not affirmative action—it is promoting equal employment opportunities. When a state agency gives a preference in hiring, however, it must ensure that its actions are justified under Title VII and, because it is a governmental entity, under the Equal Protection Clause of the United States Constitution. (Different considerations govern preferential treatment for those with disabilities because federal and state law require employers to provide “reasonable accommodations” to disabled employees.)

Title VII and the Arizona Civil Rights Act prohibit discrimination based on race, national origin, or gender. In 2010, the Arizona Constitution was amended to prohibit preferential treatment of (as well as discrimination against) any person or individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting in Arizona. Ariz. Const. art. II, § 36(A). Prior to this constitutional amendment, an Arizona agency could use race, ethnicity, or gender as a factor when evaluating qualified candidates for hiring or promotion, provided that such use 1) was part of an affirmative action plan; 2) was done to remedy past discrimination, whether or not intentional; 3) did not bar advancement of white or male employees or require their termination; and 4) would phase out if a racial or gender balance was ever achieved. Historically, courts have upheld appropriate affirmative action plans against Title VII claims. See, e.g., *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 641-42 (1987) (upholding the use of gender to promote a female employee over an equally qualified male employee); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979) (upholding a provision that required the employer to award one-half of all skilled craft promotions to black employees until the percentage of black skilled craftsmen approximated the percentage of blacks in the local labor force); *Gilligan v. Dep’t of Labor*, 81 F.3d 835, 837 (9th Cir. 1996) (upholding the use of gender, consistent with an existing affirmative action plan, to promote a female employee over a male employee). Following the amendment to Arizona’s Constitution, however, an Arizona governmental agency’s use of hiring or promotional preferences based on protected classifications may not be permissible, unless such preferences fall within several narrow exceptions to the constitutional prohibition. See Ariz. Const. art. II, § 36(B) (excepting sex-based bona fide qualifications, preferences necessary to maintaining federal monies, and court orders and consent decrees that preceded the amendment from the prohibition on use of preferences).
A public employer’s affirmative action plan must also survive an equal protection analysis, which means that, at least with respect to the use of race, the plan must be narrowly tailored and necessary to further a compelling government interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995). Because eradicating discrimination is one of the most important government interests, courts have upheld affirmative action plans despite application of this strict scrutiny analysis. See, e.g., *Higgins v. City of Vallejo*, 823 F.2d 351, 358 (9th Cir. 1987) (upholding the use of race in hiring a black applicant as a firefighter based on a showing of prior discrimination by the City). A public agency that has an affirmative action plan should ensure that it has some evidence of past discrimination in the form of a statistical imbalance in the workforce, a record of employee complaints, published reports, or other material that documents the barriers to full and equal employment that women and minorities have faced.

15.16.1 Affirmative Action as a Component of Court-Ordered Relief. Affirmative action plans may also be created by court orders issued after employers lose employment discrimination cases. Title VII and the Arizona Civil Rights Act authorize a court to award prospective relief. See 42 U.S.C. § 2000e-5(g); A.R.S. § 41-1481(G). Courts have also ordered affirmative action to resolve labor disputes. See, e.g., *Local 28, Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 442-43 (1986). Some courts have even ordered affirmative action that establishes quotas for minority hires and promotions. See, e.g., *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding quotas for black state troopers in the Alabama Department of Public Safety); *Eldredge v. Carpenters* 46, 94 F.3d 1366, 1370 (9th Cir. 1996) (reserving twenty percent of positions in apprenticeship program for women until women comprised twenty percent of the total number of apprentices). Whether such orders can be reconciled with Article II, Section 36 of the Arizona Constitution is an open question.

15.17 Facial Discrimination. There are two distinct theories of intentional discrimination: facial discrimination and disparate treatment.

The first of these two theories, facial discrimination, requires the plaintiff to prove as part of the prima facie case that the employer has a policy or employs a practice that intentionally discriminates against an individual or a class of individuals based on race, color, national origin, religion, age, disability, or sex. For example, a policy of not hiring women for jobs traditionally held by men, such as custodial or janitorial jobs, is discriminatory on its face.

When a plaintiff establishes a prima facie case of facial discrimination, the burden shifts to the employer to justify its discriminatory acts by proving that religion, sex, national origin, or age is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." See 42 U.S.C. § 2000e-2(e); A.R.S.

15.17.1 Bona Fide Occupational Qualifications. Title VII, the ADEA, and the Arizona Civil Rights Act permit an employer to discriminate against an individual based upon an individual’s age, sex, national origin, or religion when the employer can demonstrate that the characteristic is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the employer’s business or enterprise. This is an extremely narrow exception to the general prohibition against discrimination. W. Airlines, Inc. v. Criswell, 472 U.S. 400, 412 (1985). To demonstrate that a category is a BFOQ, the employer must establish a substantial basis for believing that all or nearly all possible employees outside the specific category lack the qualifications that the position requires. Id. at 414.

Race, color, or disability are never bona fide occupational qualifications. See A.R.S. § 41-1463(G)(1), (G)(4)(a). To establish a BFOQ defense, the employer must prove that all or substantially all members of the protected group would be unable to perform the job safely and efficiently, see Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971); see also Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980) (adopting the BFOQ standard partially developed in Diaz), or that it is impracticable to deal with members of the protected group on an individual basis, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 228 n.8 (5th Cir. 1976); see also EEOC v. Santa Barbara Cnty., 666 F.2d 373, 376 (9th Cir. 1982); EEOC v. Los Angeles Cnty., 706 F.2d 1039, 1042-1043 (9th Cir. 1983). The term “occupational” in BFOQ means that any employment requirement permitted under this exception must be related to an employee’s “job-related skills and aptitudes” and not to personal attributes that satisfy some other, subjective requirement. International Union v. Johnson, 499 U.S. 187, 201 (1991). The mere preference of the individuals whom the employer serves does not constitute a BFOQ. See Diaz, 442 F.2d at 389.

15.18 Disparate Treatment. Disparate treatment is the most commonly used theory of discrimination. It occurs when the employer treats some persons less favorably or differently because of their protected class characteristics or in retaliation for protected activity. Plaintiffs may establish disparate treatment through circumstantial or direct evidence.

To establish a prima facie case of disparate treatment using circumstantial evidence, the plaintiff must make factual allegations that eliminate the most common nondiscriminatory reasons for the alleged harm and that raise an inference that the harm would not have occurred in the absence of unlawful discrimination. The plaintiff always has the ultimate burden of proving discriminatory intent. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Under some circumstances, however, such intent can
be inferred where the employer treats a member of a protected group differently from individuals who are not members of that group. Civil Rights Div. v. Amphitheater Unified Sch. Dist. No. 10, 140 Ariz. 83, 85, 680 P.2d 517, 519 (App. 1983).

As an example, in a hiring situation, the plaintiff establishes a prima facie case of disparate treatment using circumstantial evidence by demonstrating that he or she applied for a position, was qualified, was rejected, and the position remained open. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The elements of this theory will vary, depending on the specific harm that has been alleged. Once the plaintiff has established the prima facie case, the employer must articulate an admissible, reasonably specific nondiscriminatory reason for its decision. Amphitheater, 140 Ariz. at 85, 680 P.2d at 519; McDonnell Douglas, 411 U.S. at 802. Once the employer articulates such a reason, the plaintiff bears the burden of showing that the reason was a pretext for the discrimination. Reeves v. Sanderson Plumbing Prosds., Inc., 530 U.S. 133, 143 (2000); Burdine, 450 U.S. at 256; Amphitheater, 140 Ariz. at 85, 680 P.2d at 519.

The plaintiff may also establish a prima facie case of disparate treatment through direct evidence that demonstrates the employer’s discriminatory motivation. See Price Waterhouse v. Hopkins, 490 U.S. 228, 230 (1989) (plurality opinion). “Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer.” Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1095 (9th Cir. 2005); see also Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (holding that plant manager calling black workers “boy” could constitute direct evidence of discriminatory animus). If direct evidence of discrimination is presented, then the McDonnell Douglas burden-shifting scheme does not apply and the employer cannot rebut the evidence of discriminatory motive simply by presenting a legitimate reason for the employment decision. Enlow v. Salem-Keizer Yellow Cab Co., Inc., 389 F.3d 802, 812 (9th Cir. 2004). Under Arizona law, however, the employer may have a defense if it can demonstrate that it would have made the same decision absent any discriminatory animus. See, e.g., Timmons v. City of Tucson, 171 Ariz. 350, 356, 830 P.2d 871, 877 (Ct. App. 1991) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

A disparate impact discrimination claim is timely if it is raised within the Title VII or ACRA limitations period following any application of a policy that produces a disparate impact. Lewis v. City of Chicago, 130 S. Ct. 2191, 2200 (2010). To establish a prima facie case under the disparate impact theory, the plaintiff must show that the employer uses a facially neutral business practice that disproportionately affects the protected group to which the plaintiff belongs. See Griggs, 401 U.S. at 429-30. The business practice often takes the form of a test or a height or weight requirement for job applicants. Another example is an English-only policy, which may have a disparate impact on Latino employees.

Once the plaintiff establishes this prima facie case, the burden shifts to the employer to show that the challenged practice is job-related and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A); Amphitheater, 140 Ariz. at 85, 680 P.2d at 519; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). To be deemed a business necessity, the challenged practice “must have a manifest relationship to the employment in question,” Griggs, 401 U.S. at 432. In the case of a challenged test, the employer must “validate the examination by showing that it is a realistic measure of job performance.” Bouman v. Block, 940 F.2d 1211, 1228 (9th Cir. 1991) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 426-27 (1975)). If the employer meets its burden, the employee must show that there are alternative employment practices that would have less impact on the protected person or class. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Further, if the employee seeks to invalidate the results of a qualifying test and thereby give rise to a disparate treatment claim from previously qualified applicants of another protected class, to survive summary judgment, the employee must have a “strong basis in evidence” that vacating the test results is necessary for the employer to avoid liability for disparate impact discrimination. Ricci v. DeStephano, 129 S. Ct. 2658, 2673 (2009).

15.20 Mixed Motive Cases. Sometimes an employer has more than one motive for taking a particular employment action. A case in which an employer has both a discriminatory and a nondiscriminatory motive is referred to as a “mixed motive” case. Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003). Under federal law, if an employer was motivated by a discriminatory factor—such as race, color, religion, sex, or national origin—it has engaged in employment discrimination and the employee is entitled to injunctive relief, costs, and fees. 42 U.S.C. § 2000e-2(m), e-5(g)(2)(B). If the employer proves that it would have made the same decision if it had not considered the discriminatory factor, it is not liable for reinstatement, lost wages, or damages. Id. § 2000e-5(g)(2)(B). Arizona law is different. Under the Arizona Civil Rights Act, a defendant may avoid all liability for discriminatory conduct if it proves by a preponderance of the evidence that it would have made the same decision even if it had not considered the discriminatory factor. See Timmons v. City of Tucson, 171 Ariz. 350, 356, 830 P.2d 871, 877 (App. 1991).
**15.21 Remedies Under the Arizona Civil Rights Act.** Under the Arizona Civil Rights Act, remedies for employment discrimination include back and front pay (the only monetary relief), injunctive relief, reinstatement, and attorney's fees. A.R.S. § 41-1481(G), (J). The remedies available under the federal employment laws include monetary relief that is not currently available under the Arizona Civil Rights Act.

**15.22 Remedies in Title VII and § 1981 Actions.** Before the Civil Rights Act of 1991 became effective, only equitable remedies were generally available under Title VII: a hiring order or reinstatement, back pay, front pay where reinstatement was not feasible, and attorney's fees. The 1991 Act expanded these remedies by providing for compensatory and punitive damages for intentional discrimination against most employers in actions brought pursuant to Title VII and in many actions brought pursuant to the Americans with Disabilities Act (ADA). See 42 U.S.C. § 1981a; see also Section 15.26. These compensatory and punitive damages combined are capped on a sliding scale depending on the employer's number of employees. For an employer with 500 or more employees, the cap is $300,000 for each complaining party. 42 U.S.C. § 1981a(b)(3)(D).

The 1991 Act exempts public employers from liability for punitive damages, Id. at § 1981a(b)(1), but the size of the combined cap remains the same even when punitive damages are not permitted. This means that a jury may still award damages of up to $300,000 against a large public employer as long as it characterizes those damages as compensatory rather than punitive. Also, since most Title VII race and ethnicity complaints are concurrently brought under 42 U.S.C. § 1981, which has no cap for damages, the cap effectively limits punitive and compensatory damages only for cases that involve gender, religious, or disability discrimination. Excessive punitive damages award under Section 1981, however, are subject to reduction on due process grounds. See, e.g., Bains v. ARCO Products, Co., 405 F.3d 764, 775-77 (9th Cir. 2005). The 1991 Act's provision for an award of damages is separate from and in addition to the equitable remedies, such as back pay, that Title VII, 42 U.S.C. § 2000e-5(g), provides. When a complainant requests compensatory or punitive damages under 42 U.S.C. § 1981a, the parties are entitled to a jury trial of the matter. Id. § 1981a(c).


**15.23 Attorney's Fees.** Title VII permits the court to award attorney's fees to the prevailing party. 42 U.S.C. § 2000e-5(k). The court should ordinarily award fees to a prevailing plaintiff, but may award fees to a defendant employer only where the employee's


15.24 Remedies for an Equal Pay Act Violation. Remedies for an Equal Pay Act violation include lost wages plus an equal amount as liquidated damages, injunctive relief, and attorney's fees. 29 U.S.C. § 216(c). If the employer shows that it acted in good faith and believed that its actions were legal, the court may limit the award to back wages. Id. § 260.

15.25 Remedies Under the ADEA. Remedies under the ADEA include lost wages plus an equal amount as liquidated damages, injunctive relief, reinstatement or front pay, and attorney's fees. Id. § 216(c). Liquidated damages can be awarded only for willful violations. A violation is willful if the employer knew that its conduct was prohibited or showed reckless disregard for whether its conduct was unlawful. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985). A violation is not willful if the employer simply knew of the ADEA's potential applicability. Id. at 127. The successful plaintiff may recover attorney's fees, but successful defendants may do so only where the action is frivolous or in bad faith. 29 U.S.C. § 216(b); See Yartzoff v. Oregon, 745 F.2d 557 (9th Cir. 1984).

In Kimel v. Florida Board of Regents, 528 U.S. 62, 91-92 (2000), the Supreme Court held that state governments have sovereign immunity under the Eleventh Amendment from private age discrimination lawsuits for monetary relief under the ADEA. The effect of this decision is that individuals, such as applicants for employment or employees, cannot sue the State for monetary relief for federal age discrimination claims. They still can sue under the Arizona Civil Rights Act, but as noted above, the monetary relief available is limited to lost wages.

Kimel should not prevent a state employee from seeking injunctive or other non-monetary relief under the federal law, and it does not prevent the EEOC or any other federal agency from suing the State for monetary damages.

15.26 Remedies Under the ADA. Remedies under the ADA for employment discrimination are the same as those under Title VII and are obtained through the same administrative process before the EEOC that is available for other types of discrimination.
42 U.S.C. § 12117. Under the ACRA, plaintiffs’ monetary damages are limited to up to two years of back pay. A.R.S. § 41-1481(G).

In addition, the 1991 Civil Rights Act permits discrimination victims to obtain compensatory and punitive damages. See 42 U.S.C. § 1981a. In appropriate circumstances, these damages may be as high as $300,000 per incident (where an employer has more than 500 employees). Monetary remedies are capped based on the size of the employer in an action brought under Title I of the ADA. Id. § 1981a(b)(3). The ADA does not, however, preempt any law that gives disabled individuals greater protection. 42 U.S.C. § 12201; 29 C.F.R. § 1630.1(c). Attorney’s fees are available to the prevailing charging party or plaintiff in both administrative and court proceedings. 42 U.S.C. § 12205.

The ADA prohibits an award of damages for failure to make a reasonable accommodation where the employer made accommodation efforts in good faith. 42 U.S.C. § 1981a(a)(3).

In University of Alabama v. Garrett, 531 U.S. 356, 374 (2001), the Supreme Court held that state governments have sovereign immunity under the Eleventh Amendment from private discrimination lawsuits for monetary relief under the ADA’s employment provisions. The effect of this decision is that individuals, such as applicants for employment or employees, cannot sue the State for monetary relief for federal disability discrimination claims. Persons with physical disabilities can still sue under the Arizona Civil Rights Act, but as noted above, the monetary relief is limited to back pay.

Garrett does not prevent a state employee from seeking injunctive or other non-monetary relief under the federal law, and it does not prevent the EEOC or any other federal agency from suing the State for monetary damages.

15.27 Disability-based Discrimination in Public Services and Accommodations. Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12150 prohibits public entities such as the State of Arizona from discriminating based on disability in the provision of services, programs, or activities—this includes ensuring that public buildings are accessible. Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 to 12189, prohibits public accommodations (which are private entities)—such as hotels, theaters, museums, golf courses, homeless shelters, dry cleaners, or stores—from discriminating with respect to the public accommodations that they operate. Id. § 12181(7).

A public accommodation may not discriminate in the provision of goods, services, facilities, privileges, advantages, or accommodations against a person with a disability, a person who has a relationship or association with a person with a disability, or a person who has engaged in protected conduct. Id. § 12182; 28 C.F.R. § 36.101 to -.608; A.R.S. § 41-1492. 02(A), (B), (F). See United States Department of Justice, The Americans with Disabilities Act, Title III Technical Assistance Manual, available at www.ada.gov/taman3.html.
Arizona enacted the Arizonans with Disabilities Act (“AzDA”) to encompass the protections of Title II and Title III of the ADA. A.R.S. § 41-1492. The AzDA differs from Title II because it only requires a public entity to ensure that buildings and facilities that are leased or constructed in whole or part with state or local monies or the monies of political subdivisions are accessible. A.R.S. § 41-1492.01. Although the AzDA does not contain the Title II provisions regarding services, programs, and activities, the State must still comply with Title II, and therefore, a plaintiff would have a federal claim, though not a state claim, if a State program, for instance, refused to allow the individual to participate in a program because of disability. The AzDA’s provision governing public accommodations is as broad as Title III’s. The AzDA states that compliance with Title II and Title III of the ADA and its implementing regulations constitutes compliance with the AzDA.

For purposes of Title II and III of the ADA and the AzDA, “disability” is defined the same way that it is under the ADA’s employment provisions as "a[ny] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102; A.R.S. § 41-1492(6); 28 C.F.R. § 35.104. See Section 15.11. The prohibition against discrimination in the provision of services, programs, or activities is read broadly to include most, if not all, activities of public entities. See, e.g., Pennsylvania Dep’t of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

The ADA protects persons with a disability and persons who have a relationship with or who associate with persons with a disability. 28 C.F.R. § 35.130(g). It also protects persons who engage in protected activity. Id. § 35.134. This Section only discusses Title II’s general provisions, which appear in Part A. The United States Department of Justice has published regulations concerning Title II, Id. §§ 35.101 to 35.190, as well as a Title II Technical Assistance Manual, available at www.ada.gov/taman2.html. New Title II regulations, which adopt the 2004 ADAAG revisions and significantly alter service animal provisions, become effective on March 15, 2011, and are available at www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf. New Title III regulations, which adopt the 2004 ADAAG revisions and significantly alter service animal provisions, also become effective on March 15, 2011, and are available at www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf.

Complaints concerning violations of Titles II or III of the ADA should be filed by email (preferred) to ada.complaint@usdoj.gov or by mail to the United States Department of Justice, Disability Rights Section, Civil Rights Division, P.O. Box 66738, Washington, D.C. 20035-6738. See www.ada.gov/fact_on_complaint.htm#1 for information about filing an ADA complaint.
15.27.1 General Discrimination Prohibitions. Title II’s general discrimination prohibitions prevent public entities, such as the State of Arizona, from excluding or segregating individuals with disabilities in providing governmental services, programs, or activities. See 28 C.F.R. § 35.130. It also prevents governmental entities from using stereotypes, presumptions, fears, and patronizing attitudes about individuals with disabilities as reasons for denying such individuals the same opportunities or services that others enjoy. The ADA and its implementing regulations broadly define unlawful discrimination as actions that adversely affect individuals with disabilities. These actions include:

1. Denying individuals with disabilities the right to participate in or benefit from the aid, benefit, or service that a governmental entity provides, 28 C.F.R. § 35.130(b)(1)(i);

2. Providing individuals with disabilities with a lower level of services, aids, or benefits than is provided to similarly situated persons without disabilities, id. § 35.130(b)(1)(ii);

3. Providing individuals with disabilities with aids, benefits, services, or special programs that are less effective than those provided to individuals without disabilities or providing such individuals different or separate aids, benefits, or services unless necessary for effectiveness, id. § 35.130(b)(1)(iii) & (iv);

4. "Providing significant assistance to an agency, organization, or person that discriminates on the basis of disability," id. § 35.130(b)(1)(v);

5. Limiting individuals with disabilities "in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others," id. § 35.130(b)(1)(vii);

6. "Establish[ing] requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability," id. § 35.130(b)(6).

7. Failing to "make reasonable modifications in policies, practices, or procedures when . . . necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that [the only reasonable modification] would fundamentally alter the nature of the service, program, or activity," id. § 35.130(b)(7);

8. Using criteria in selecting procurement contractors that subject otherwise qualified contractors to discrimination based on disability, id. § 35.130(b)(5);
9. Imposing "eligibility criteria that screen out or tend to screen out an individual with a disability . . . unless such criteria [are] necessary" for the provision of the program, service, or activity, *id.* § 35.130(b)(8); and

10. Failing to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," *id.* § 35.130(d).

### 15.27.2 Eliminating Segregation and Other Barriers.

Requiring a person with a disability to receive services only in segregated facilities perpetuates unwarranted assumptions that the person is incapable or unworthy of participating in community life and is not permitted under the ADA. *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581, 583 (1999). This does not mean that persons with disabilities who are unable to handle or benefit from community settings or who do not wish to use them are required to do so. *Id.* at 602.

The ADA also requires public entities to provide their services, programs, and activities in the most integrated setting that is appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. § 35.130(b)(1)(iv), (b)(2).

### 15.27.3 Physical Accessibility Requirements.

Title II requires a public entity to maintain in operable condition those features of its facilities and equipment that are necessary to make such facilities and equipment readily accessible to and usable by individuals with disabilities. *Id.* § 35.133(a). It is insufficient to provide accessible routes, elevators, or ramps if those features are not maintained in a manner that enables individuals with disabilities to use them. Isolated or temporary interruptions in service or access due to maintenance or repairs are permissible; however, allowing obstructions to persist beyond a reasonable period violates the ADA. Violations may also occur through repeated mechanical failures due to improper or inadequate maintenance, failure to ensure that accessible routes are properly maintained and free of obstructions, and failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access. See *Id.* § 35.133(a).

### 15.27.4 Program Accessibility.

The concept of program accessibility that applied to federally conducted programs or activities under § 504 of the Federal Rehabilitation Act is extended by the ADA to all programs, whether or not they receive federal assistance. Each service, activity, or program that a public entity conducts, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. *Id.* § 35.150. Standards used in this section are the same as the standards established in Title III of the ADA. The only exceptions to the accessibility requirement involve cases in which ensuring
accessibility would result in (a) the threatened destruction of historically significant property; (b) a fundamental alteration in the program's nature; or (c) undue financial and administrative burdens. *Id.* § 35.150(a)(2), (3). In determining whether providing accessibility would pose undue financial and administrative burdens, consideration is given to all public entity resources available for use in the funding and operation of the service, program, or activity. *Id.* § 35.150(a)(3). Where full accessibility can be assured only by actions that would result in a fundamental alteration in the program's nature or in undue financial and administrative burdens, the public entity is required to take other steps necessary to ensure that individuals with disabilities receive the benefits or services that the entity provides. *Id.* § 35.150(a)(3).

**15.27.5 Communications.** The ADA requires public entities to take all appropriate steps necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. *Id.* § 35.160(a). When necessary, this requires a public entity to provide auxiliary aids and services to afford an individual with a disability an opportunity to participate in and enjoy the benefits of the public entity's service, program, or activity. *Id.* § 35.160(b)(1). Public entities are also required to provide an opportunity for individuals with disabilities to request the auxiliary aid and service of their choice, to give that choice primary consideration, and to honor the choice unless another effective means of communication exists or the individual's choice is not required by the ADA. *See Id.* § 35.160(b)(2).

Auxiliary aids and services include: qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYS), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing; qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision. *Id.* § 35.104. The ADA requires governmental entities to provide any aids or accommodations at no charge to the individual with a disability, since requiring individuals to pay for the aids or accommodations would impose a barrier to equal access to services or benefits that the entities do not impose upon individuals without disabilities. *Id.* § 35.130(f).
The auxiliary aid or service required to satisfy the communication requirements of Title II will vary based on the method of communication utilized by the individual with a disability and the nature, length, and complexity of the communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. *Id.* § 35.160(b)(2). A public entity may not do the following regarding interpretive services or to facilitate communication:

- Require the individual with the disability to bring his/her own interpreter;

- Rely on an adult accompanying the individual unless there is an emergency situation involving imminent threat to the safety or welfare of the individual or the public or the individual with a disability and the adult accompanying him/her specifically requests that the adult facilitate the communication, but even then, only if it is appropriate in the circumstances;

- Rely on a minor child unless there is an emergency situation involving an imminent threat to the safety or welfare of the individual or the public.

*Id.* § 25.160(c).

When a public entity uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay system, including Internet-based relay systems. A public entity must respond to telephone calls from a telecommunications relay service in the same manner that it responds to other telephone calls. *Id.* § 35.161(c).

15.27.6 Service Animals. Titles II and III of the ADA and the AzDA require public entities and public accommodations to modify their policies to permit the use of service animals by an individual with a disability. *Id.* §§ 35.136; 36.302(c); A.R.S. § 11-1024.

In 2010, the Department of Justice’s regulations defined service animals as a dog or miniature horse that is individually trained to do work or perform a task for an individual with a disability. The task(s) the animal performs must be directly related to the handler’s disability. 28 C.F.R. §§ 35.104; 36.104. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric
and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. *Id.* §§ 35.104; 36.104. A public entity generally may not inquire as to the disability of the individual. *Id.* § 35.136(f). A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. *Id.* A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. *Id.* Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (for example, a dog guiding an individual with a visual impairment). *Id.* § 35.134.

A public entity may exclude a service animal only if the animal is out of the handler’s control and the handler does not re-establish control or if the animal is not housebroken. *Id.* §§ 35.136(b); 36.302(c)(2). If the service animal is properly excluded, the public entity must give the individual with a disability the opportunity to participate in the program or activity without the service animal. *Id.* §§ 35.136(c); 36.302(c)(3). A public entity may not charge a fee or surcharge for a service animal, even if the entity typically charges for other animals. *Id.* §§ 35.136(h); 36.302(c)(8). A public entity may charge for damage caused by a service animal. *Id.* §36.302(c)(3).

Finally, the ADA requires all public entities to provide information concerning accessible services, activities, and facilities to individuals with disabilities. *Id.* § 35.163. This requires: (1) that the entity provide signage at all inaccessible entrances to each of its facilities that directs users to accessible entrances or to locations at which they will find information about accessible entrances; and (2) that where TDD-equipped pay phones or portable TDDs exist, clear signage be posted indicating their location. *Id.* § 35.162.

15.27.7 New Construction and Alterations. The ADA requires that buildings that are designed, constructed, or altered by, on behalf of, or for the use of a public entity after January 26, 1992, meet certain design and construction standards. *Id.* § 35.151. Public entities seeking information on those standards should consult their legal counsel.

15.27.8 Remedies.

Under the Arizonans with Disabilities Act, the victim can obtain actual damages, compensatory damages, injunctive relief, attorney’s fees, and civil penalties. A.R.S. § 41-1492.09.

Remedies available under Title II of the ADA include all remedies available under § 504 of the Federal Rehabilitation Act of 1973. 29 U.S.C. § 794a. These include damages, injunctive relief, attorney's fees, and costs. Both Title II, 42 U.S.C. § 12133, and the Rehabilitation Act, 29 U.S.C. § 794a, provide remedies equivalent to those authorized in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. A federal contracting or granting agency has the power under the Rehabilitation Act to terminate a
contract. *Id.* § 2000d-1. In addition, under Title VI, a person may bring a private cause of action in tort against governmental entities and federal contractors or grantees for intentional discrimination. *Guardians Ass’n v. New York City Civil Serv. Comm’n*, 463 U.S. 582, 584 (1983). The Title I caps on recoverable damages would not apply in such an action.
# CHAPTER 16
## LOBBYING

### Table of Contents

| Section 16.1 | Scope of this Chapter |
| Section 16.2 | Definition of Selected Terms in Lobbying Act |
| 16.2.1 | Authorized Public Lobbyist |
| 16.2.2 | Designated Public Lobbyist. |
| 16.2.3 | Entertainment |
| 16.2.4 | Expenditure |
| 16.2.5 | Single Expenditure |
| 16.2.6 | Food or Beverage |
| 16.2.7 | Legislation |
| 16.2.8 | Lobbying |
| 16.2.9 | Public Body |
| 16.2.10 | Gift |
| 16.2.11 | Speaking Engagement |
| 16.2.12 | State Officer |
| 16.2.13 | Technical Expert |
| Section 16.3 | Registration of Public Body |
| Section 16.4 | Registration of Lobbyists |
| Section 16.5 | Annual Report of Expenditures |
| Section 16.6 | Expenditures Not Required to be Included in Annual Report |
| Section 16.7 | Quarterly Reports of Expenditures |

Revised 2011
<table>
<thead>
<tr>
<th>Section 16.8</th>
<th>Prohibited Gifts to and Expenditures to State Officers and Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 16.9</td>
<td>Exemptions from Registration and Reporting Requirements of A.R.S. § 41-1232.01 of Concern to State Officers and Employees</td>
</tr>
<tr>
<td>Section 16.10</td>
<td>Exemption for Uncompensated Members of State Agencies, Boards, and Commissions</td>
</tr>
<tr>
<td>Section 16.11</td>
<td>Prohibited Contributions During Regular Session of Legislature</td>
</tr>
<tr>
<td>Section 16.12</td>
<td>Prohibited Acts</td>
</tr>
<tr>
<td>Section 16.13</td>
<td>Entertainment Ban</td>
</tr>
<tr>
<td>Section 16.14</td>
<td>Enforcement</td>
</tr>
</tbody>
</table>
CHAPTER 16

LOBBYING

16.1 Scope of This Chapter. Lobbying activities and expenditures by public bodies are subject to the registration and reporting requirements set forth in A.R.S. §§ 41-1231 to -1239. Any state employee involved with lobbying should consult the Secretary of State’s publication titled “Lobbying in Arizona,” which is published pursuant to A.R.S. § 41-1232.05 and contains the relevant statutes, written guidelines, and forms. This Chapter summarizes the key terms and provisions of the state law regulating lobbying.

16.2 Definition of Selected Terms in Lobbying Act.

16.2.1 Authorized Public Lobbyist. “‘Authorized public lobbyist’ means a person, other than a designated public lobbyist, who is employed by, retained by or representing a public body, with or without compensation, for the purpose of lobbying and who is listed as an authorized public lobbyist by the public body in its registration pursuant to section 41-1232.01.” A.R.S. § 41-1231(2).

16.2.2 Designated Public Lobbyist. “‘Designated public lobbyist’ means the person who is designated by a public body as the single point of contact for the public body and who is listed as the designated public lobbyist by the public body in its registration pursuant to section 41-1232.01.” A.R.S. § 41-1231(4).

16.2.3 Entertainment. “‘Entertainment’ means the amount of any expenditure paid or incurred for admission to any sporting or cultural event or for participation in any sporting or cultural activity.” A.R.S. § 41-1231(5).

16.2.4 Expenditure. “‘Expenditure’ means a payment, distribution, loan, advance, deposit or gift of money or anything of value and includes a contract, promise or agreement, whether or not legally enforceable, to make an expenditure that provides a benefit to an individual state officer or state employee and that is incurred by or on behalf of one or more principals, public bodies, lobbyists, designated public lobbyists or authorized public lobbyists.” A.R.S. § 41-1231(6).

16.2.5 Single Expenditure. “‘Single Expenditure’ means an expenditure that provides a benefit of more than twenty dollars to an individual state officer or state employee and that is incurred by or on behalf of one or more principals, public bodies, lobbyists, designated public lobbyists or authorized public lobbyists.” A.R.S. § 41-1231(19). See A.R.S. § 41-1232.03(D).

16.2.6 Food or Beverage. “‘Food or Beverage’ means the amount of any expenditure paid or incurred for food or beverages for a state officer or employee provided at a location at which the principal, public body, lobbyist, designated public
lobbyist or authorized public lobbyist who made the expenditure is present.” A.R.S. § 41-1231(8).

16.2.7 Legislation. “‘Legislation’ means bills, resolutions, memorials, amendments, nominations and other matters that are pending or proposed in either house of the legislature of this state or for purposes of bonding lobbying for any matter pending or proposed before any school district governing board.” A.R.S. § 41-1231(10).

16.2.8 Lobbying. “‘Lobbying’ means attempting to influence the passage or defeat of any legislation by directly communicating with any legislator, or in the case of bonding, lobbyists directly communicating with any school district employee or a school district governing board member or attempting to influence any formal rulemaking proceeding pursuant to Chapter 6 of [Title 41] or rulemaking proceedings that are exempt from Chapter 6 of [Title 41] by directly communicating with any state officer or employee.” Lobbying does not include:

(a) Interagency communications between state agency employees.

(b) Communications between a public official or employee of a public body, designated public lobbyist or authorized public lobbyist and any state officer, except for a member of the legislature, or employee.

(c) Oral questions or comments made by a person to a state officer or employee regarding a proposed rule made in public at a meeting or workshop that is open to the public and that is sponsored by a state agency, board, commission, council or office.

A.R.S. § 41-1231(11).

16.2.9 Public Body. “‘Public Body’ means the Arizona [B]oard of [R]egents, a university under the jurisdiction of the Arizona [B]oard of [R]egents, the judicial department, any state agency, board, commission or council, any county, any county elected officer who elects to appoint a designated public lobbyist or any city, town, district or other political subdivision of this state that receives and utilizes tax revenues and that employs, retains, engages or uses, with or without compensation, a designated public lobbyist or authorized public lobbyist.” A.R.S. § 41-1231 (17).

16.2.10 Gift. “‘Gift’ means a payment, distribution, expenditure, advance, deposit or donation of money, any intangible personal property or any kind of tangible personal or real property. The term does not include:

a) A gift, devise or inheritance from an individual’s spouse, child, parent, grandparent, grandchild,
brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle or first cousin or the spouse of any such individual if the donor is not acting as the agent or intermediary for someone other than a person covered by this subdivision.

b) Expenditures which are either properly reported or exempt from reporting under this chapter for:

(i) A speaking engagement.
(ii) Food or beverages.
(iii) Travel and lodging.
(iv) Flowers.

c) Salary, compensation or employer—reimbursed expenses lawfully paid to a public official.

d) The value, cost or price of professional or consulting services that are not rendered to obtain a benefit for any registered principal, public body, lobbyist, designated public lobbyist or authorized public lobbyist or the clients of a principal or lobbyist.

e) Expenses relating to a special event or function to which all members of the legislature, either house of the legislature or any committee of the legislature are invited.

f) A plaque or other form of recognition similar to a plaque to a state officer or state employee to signify the honorary recognition of a service or other notable accomplishment.

g) Informational material such as books, reports, pamphlets, calendars or periodicals.

h) An item that is not used and that is returned within fifteen days of receipt to the donor or that is delivered within fifteen days of receipt to a charitable organization and that is not claimed as a charitable contribution for state or federal income tax purposes.

i) A campaign contribution that is properly received and reported as required by law.
j) An item that is given to a state officer or employee if the state officer or employee gives an item of approximately the same value to the giver of the item at the same time that the item is given or on a similar occasion as the one that prompted the original item to be given.

k) Gifts of a personal nature that were customarily received by an individual from the donor before the individual became a state officer or employee.

l) An item that is given to the general public at an event.

A.R.S. § 41-1231(9).

16.2.11 Speaking Engagement. “'Speaking Engagement' means the amount of any expense paid or incurred for entrance fees, lodging, food and beverage, entertainment, travel and other expenses for the state officer's or employee's attendance at any event, committee, meeting, conference or seminar, including meetings of state, regional or national organizations or their committees concerned with legislative or governmental activities if the state officer or employee participates in the event as a speaker or panel participant by presenting information relating to the state officer's or employee's legislative or official duties or by performing a ceremonial function appropriate to the state officer's or employee's position, . . . [but] [d]oes not include expenditures for an honorarium or any other similar fee paid to a speaker.” A.R.S. § 41-1231(20).

16.2.12 State Officer. “'State officer' means a person who is duly elected, appointed or retained through election to any state office, or a member of any state board, commission or council, and includes a member of the legislature.” A.R.S. § 41-1231(212).

16.2.13 Technical Expert. A technical expert is “a person who answers technical questions or provides technical information at the request of a lobbyist, designated public lobbyist, authorized public lobbyist or legislator and who makes no expenditure required to be reported by this article [Article 8.1, Registration and Regulation of Lobbyists].” A.R.S. § 41-1232.04(4). Registration requirements do not apply to persons who act as technical experts. Id.

16.3 Registration of Public Body. “[B]efore any public body causes any lobbying to occur on its behalf, the public body shall register with the [S]ecretary of [S]tate by filing a written statement . . . [disclosing] [t]he name and business address of the public body; [t]he name and address of a person who is the designated public lobbyist for the public body . . .; [t]he name and business address of each authorized public lobbyist employed by, retained by or representing the public body; . . . [and a] description of the expenses for which each designated public lobbyist and authorized
public lobbyist is to be reimbursed by the public body.” A.R.S. § 41-1232.01(A). This public body registration is accomplished on forms provided by the Secretary of State and available in the Secretary of State’s “Lobbying in Arizona” handbook, and must be filed, along with a $25 fee, after December 1 in each even numbered years and no later than 5:00 pm on the second Monday in January of the following odd numbered year. A.R.S. § 41-1232.01(C), (E). In addition to this public body registration, all individual lobbyists must be registered with the Secretary of State. A.R.S. § 41-1232.05. See Section 16.4, Registration of Lobbyists. “If a registration . . . cannot be accomplished or is not practicable in advance of the first attempt or occasion to lobby, registration must occur within five business days after the day on which the first lobbying attempt, occasion or activity occurs.” A.R.S. § 41-1232.01(B).

In addition to registration, a public body has the obligation to give a special notice to its designated public lobbyist and all authorized public lobbyists. A.R.S. § 41-1232.01(D). “The notice shall state that the public body has listed the designated public lobbyist or authorized public lobbyist on the public body’s registration or reregistration statement and that this listing obligates the designated public lobbyist to register and file all reports required by this article.” Id. Further, the notice “shall be accompanied by a summary of the lobbyist laws published by the secretary of state, the first page of the public body’s registration and the page of the schedule on which the designated or authorized public lobbyist’s name appears.” Id.

16.4 Registration of Lobbyists. In addition to registration by public bodies which cause lobbying to occur on their behalf, every designated public lobbyist “shall file a lobbyist registration form with the secretary of state in a format prescribed by the Secretary of State . . . any time beginning December 1 in the odd numbered year until 5:00 p.m. on the second Monday in January of each even numbered year,” “and shall read a handbook containing statutes and rules governing lobbyists for compensation, designated lobbyists and designated public lobbyists, written guidelines and forms and samples for completing the lobbyist disclosure forms.” A.R.S. § 41-1232.05(A). Authorized public lobbyists are not required to register personally, A.R.S. § 41-1232.05, but the public body must register the name of each authorized public lobbyist prior to that individual engaging in any lobbying activity, or within five business days after the first lobbying attempt, occasion or activity occurs, A.R.S. § 41-1232.01; but see Ariz. Att’y Gen. Op. I87-152 (discussing private employees “not retained for the express purpose of lobbying”). Technical experts do not have to register with the Secretary of State in any fashion as long as the technical expert provides information at the request of a lobbyist or legislator and as long as the technical expert makes no expenditure required to be reported by Article 8.1.

16.5 Annual Report of Expenditures. Each public body must file an annual report setting forth all expenditures benefitting a member of the legislature. The designated public lobbyist files the report and it must be filed by March 1 of each year for the preceding calendar year. A.R.S. § 41-1232.03(A). The report must list all single expenditures (more than $20) made by the public body “received by or benefitting a member of the legislature whether or not the expenditures were made in the course of
lobbying.” A.R.S. § 41-1232.03(A). Each expenditure must be itemized separately, showing “the date of the expenditure, the amount of the expenditure, the name of each member of the legislature receiving or benefitting from the expenditure, the category of the expenditure, and the name of the designated public lobbyist or authorized public lobbyist who made the expenditure.” Id.

“In addition each public body shall report annually the aggregate of all expenditures of twenty dollars or less received by or benefiting a member of the legislature, whether or not the expenditures were made in the course of lobbying.” Id.

The report also must “list all expenditures by the public body made in the course of lobbying for the personal sustenance, filing fees, legal fees, employees' compensation, meals, lodging and travel of the designated public lobbyist and all authorized public lobbyists employed or retained by, and representing, the public body.” Id. Employee compensation may be reported by establishing a time allocation schedule for apportioning lobbying activity based on actual experience. “The public body shall apportion expenditures that are attributable both to lobbying and to other activities of the public body and report only the portion attributable to lobbying.” Id.

The reports must identify each “single expenditure,” A.R.S. § 41-1231(19), by categories: food or beverages; speaking engagements; travel and lodging; flowers; other expenditures. A.R.S. § 41-1232.02(D).

The Annual Report of Expenditures, as well as all other lobbying reports, are filed on forms supplied by the Secretary of State and may be copied from the Secretary of State's handbook, “Lobbying in Arizona.”

Also included in the Annual Report are expenditures incurred by a public body, designated public lobbyist or authorized public lobbyist for special events for legislators. Special events include parties, dinners, athletic events and entertainment to which all members of the legislature, either house of the legislature, or any committee are invited. Expenses are not allocated to individual legislators, but the description of the event, date, location, name of group invited and total expenditures must be reported. A.R.S. § 41-1232.03(F).

16.6 Expenditures Not Required to be Included in Annual Report.
“Expenditures by a public body, designated public lobbyist or authorized public lobbyist for personal sustenance, family gifts [or] personal hospitality . . . are not required to be reported.” A.R.S. § 41- 1232.03(E). In addition, expenditures for those items excluded from the definition of a gift such as gifts and inheritances, salary lawfully paid to a public official, the value of professional or consulting services not paid to obtain a benefit, recognition awards, informational materials, lawful campaign contributions, gifts exchanged for approximately the same value, gifts customarily given and received prior to when the recipient became a state officer, and items given to the general public at an event, are not required to be reported. A.R.S. §§ 41-1232.03(E) and 41-1231(9)(a), (c),
(d), (f), (g), (h), (i), (j), (k) and (l); Section 16.2.10. The exclusions apply to quarterly reports also. See Section 16.7.

16.7 Quarterly Reports of Expenditures. No later than the last day of the month following the end of a calendar quarter, each designated public lobbyist must file a quarterly report of all single expenditures (more than $20), see Section 16.2.5, and of the aggregate of all expenditures of twenty dollars or less that were received by or benefited a member of the legislature, and which were incurred in the preceding calendar quarter by the designated public lobbyist, irrespective of whether the expenditures were made in the course of lobbying. A.R.S. §§ 41-1232.03(B) and (C). Each designated public lobbyist’s report also shall include all single expenditures and the aggregate of all expenditures of twenty dollars or less incurred during the quarter by each registered authorized public lobbyist for the same public body. Id. An expenditure received by or benefiting an employee of a public body who is not a member or employee of the legislature or a member of the household of a member or employee of the Legislature is not required to be reported. Id. The reports must itemize the expenditures setting forth separately:

a) Aggregate of all expenditures, $20 or less, not made on behalf of a public body;

b) Single expenditures, more than $20, not made on behalf of a public body;

c) Aggregate of all expenditures, $20 or less, made on behalf of a public body;

d) Single expenditures, more than $20, made on behalf of a public body.

A.R.S. §§ 41-1232.03(B) and (C). The Secretary of State provides schedules for this itemized reporting. Excluded from the quarterly reports are the same items that are excluded from the annual reports. A.R.S. § 41-1232.03(E); Section 16.6. Special events are reported in quarterly reports pursuant to the categories itemized above. A.R.S. § 41-1232.03(F).

16.8 Prohibited Gifts to and Expenditures to State Officers and Employees. No one may “make a gift to or an expenditure on behalf of a member or employee of the legislature through another person or organization for the purpose of disguising the identity of the person making the gift or expenditure.” A.R.S. § 41-1232.03(I).

Public bodies, principals, lobbyists and public lobbyists are limited in gift-giving to $10 per year per legislator. “A public body, designated public lobbyist or authorized public lobbyist or any other person acting on behalf of a public body, designated public lobbyist or authorized public lobbyist shall not give to any member of the legislature and
a member of the legislature shall not accept from a public body, designated public lobbyist or authorized public lobbyist either of the following:

1. Gifts with a total value of more than ten dollars during any calendar year.

2. Gifts that are designed to influence the member's or employee's official conduct.

A.R.S. § 41-1232.03(J); accord 41-1232.02(J).

This gift prohibition has numerous exceptions permitting expenditures for speaking engagements, food or beverages, travel and lodging and flowers properly reported and exempts specific events to which all members are invited, and gifts of a personal nature received before the person became a legislator. A.R.S. § 41-1231(9).

Finally, the gift prohibition in A.R.S. § 41-1232.03(J) “does not apply to gifts given by a public body, [or] . . . public lobbyist to an employee of a public body, . . . [who] is not a public official or a member of the household of a public official or if the gift is accepted on behalf of the public body and remains the property of the public body.” A.R.S. § 41-1232.03(K). A “‘[p]ublic official’ means a person who is duly elected, appointed, or retained through election to an elected state, county or local office.” A.R.S. § 41-1231(18).

16.9 Exemptions From Registration and Reporting Requirements of A.R.S. § 41-1232.01 of Concern to State Officers and Employees. The registration and reporting requirements of A.R.S. § 41-1232.01 do not apply to:

1. A person who appears for himself or herself before a committee of the legislature to lobby in support of or in opposition to legislation. A.R.S. § 41-1232.04(1).

2. A person who, acting in his or her own behalf, sends a letter to, converses on the telephone with, or has a personal conversation with a state officer or employee for the purpose of supporting or opposing any legislation. Id. § (2).

3. An “elected or retained public official, judge or justice, a person duly appointed to an elective public office, or an appointed member of a state . . . board, advisory committee, commission or council acting in [an] official capacity on matters pertaining to [the] office.” Id. § (3).

4. “A person who answers technical questions or provides technical information at the request of a lobbyist, designated public lobbyist, authorized public lobbyist or legislator and who makes no
expenditures required to be reported by [the Lobbying Law].”  *Id. § (4).*

5. “A person who performs professional services in drafting bills or in advising and rendering opinions to clients as to the construction and effect of proposed or pending legislation.”  *Id. § (5).*

6. “An attorney who represents clients before any court or before any quasi-judicial body.”  *Id. § (6).*

7. “A person who contacts a state officer or state employee solely for the purpose of acquiring information.”  *Id. § (7).*

8. “A person who contacts a state officer, or state employee, . . . in connection with the procurement or attempted procurement of . . . materials, services or construction.”  *Id. § (8).*

9. “A natural person who is a member of an association, and who is not [required to register as a lobbyist] for the association and who does not make any expenditures that would otherwise be required to be reported by this article.”  *Id. § (9).*

16.10 Exemption for Uncompensated Members of State Agencies, Boards and Commissions.  “[The Lobbying Law, A.R.S. §§ 41-1231 to - 1239,] does not apply to expenditures made for or gifts to members of any state agency, board, commission, committee or council who are not publicly elected and who serve without compensation provided that the expenditure or gift is not made in the course of lobbying that member.”  A.R.S. § 41-1232.06.

16.11 Prohibited Contributions During Regular Session of Legislature.  While registered under the lobbying law, “a principal, public body, lobbyist, designated public lobbyist or authorized public lobbyist shall not make or promise to make a campaign contribution to or solicit or promise to solicit campaign contributions for . . . a member of the legislature when the legislature is in regular session” or “[t]he governor when the legislature is in regular session or when regular session legislation is pending executive approval or veto.”  A.R.S. § 41-1234.01(A).

16.12 Prohibited Acts.  No person may retain another person to lobby legislation for a contingent fee; no person may lobby the legislature for compensation within one year of leaving the legislature as a member, and no person may in any manner “improperly seek to influence the vote of any member of the legislature through communication with that member’s employer.”  A.R.S. § 41-1233.

16.13 Entertainment Ban.  In 2000, the Legislature enacted a broad ban on entertainment expenditures.  A.R.S. § 41-1232.08.  The ban prohibits any lobbyist of any type, principal, public body, or any other person acting for these persons, from making
an expenditure for entertainment which benefits any State officer, elected official, state employee, corporation commissioner, county supervisor, city or town council member, or school district governing board member. A.R.S. § 41-1232.08. Entertainment means any expenditure for admission to, or participation in, any sporting or cultural event or activity. A.R.S. § 41-1231(5). Expenditures for special events defined in A.R.S. § 41-1232.03(F) and for speaking engagements defined in A.R.S. § 41-1231(20) are still lawful, but must be reported on lobbyists annual and quarterly reports. State employees and all elected officials are reminded that it is unlawful for them to accept entertainment from any lobbyist or principal. This is true “if the State officer subsequently reimburses the lobbyist for the expenditure; . . . however, a lobbyist paid for entertainment that, at the time of the payment, was not for a particular State officer or employee, a State officer or employee may purchase the entertainment from the lobbyist, at full cost, before receiving the ticket.” Ariz. Att’y Gen. Op. I00-031.

16.14 Enforcement. The lobbying law is enforceable by criminal and civil proceedings pursuant to A.R.S. §§ 41-1237 to -1237.01.