



ARKANSAS
Public Health Law
Bench Book

Developed By:
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Disclaimer: This Bench Book is intended to be a resource and guide for judges sitting on the bench and those practicing in public health. It is not intended to serve as legal advice in place of a qualified attorney. As of the date of publication, the Arkansas General Assembly had amended the Arkansas Emergency Services Act. Please see Act 165 of 2009 for more information. All citations to statutes and regulations were current as of 2009.

ARKANSAS PUBLIC HEALTH PREPAREDNESS BENCH BOOK

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GLOSSARY OF TERMS

- A. **Biological Waste (Microbiological Waste):** Includes, but is not limited to, cells and tissue cultures, culture medium or other solution and stocks of infectious agents, organ cultures, culture dishes, devices used to transfer, inoculate, and mix cultures, paper and cloth which have come in contact with specimens or cultures, and discarded live vaccines. Ark. Code Ann. § 20-32-101(5)(D).
- B. **Bioterrorism:** The intentional use of any microorganism, virus, infectious substance, or biological product that may be engineered as a result of biotechnology or any naturally occurring or bioengineered component of any microorganism, virus, infectious substance, or biological product to cause or attempt to cause death, disease, or other biological malfunction in any living organism. Ark. Code Ann. § 20-13-1201(1).
- C. **Case:** An instance of disease; a patient. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).
- D. **Communicable:** Capable of being communicated or transmitted; particularly used to describe diseases. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).
- E. **Communicable Disease:** Any disease that is transmissible by infection or contagion directly or through the agency of a vector. Stedman's Medical Dictionary (27th ed. 2000). See List of "[Notifiable diseases and condition.](#)"
- F. **Contact:** A person who has been exposed to a contagious disease. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).
- G. **Contagious Disease:** See "Notifiable diseases and conditions."
- H. **Decontamination:** The elimination of poisonous or otherwise harmful agents, such as chemicals or radioactive materials, from a person or object. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).
- J. **Disaster:** Any tornado, storm, flood, high water, earthquake, drought, fire, radiological incident, air or surface-borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces, enemy attack, or any other means which: (A) In the determination of the Governor or the Director of the Arkansas Department of Emergency Management, or his or her designee, is or threatens to be of sufficient severity and magnitude to warrant state action or to require assistance by the state to supplement the efforts and available resources of local governments and relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby, and with respect to which the chief executive of any political subdivision in which the disaster occurs or threatens to occur certifies the need for state assistance and gives assurance of the local government for alleviating the damage, loss, hardship, or suffering resulting from such disaster; or (B)(i) Results in an interruption in the delivery of utility services when emergency declarations are required and when delays in obtaining an

emergency declaration from the Governor or the director or his or her designee would hamper and delay restoration of utility service; (B)(ii) In those instances, the Governor or the director or his or her designee may make such emergency determination subsequent to the initiation of the restorative work. Ark. Code Ann. § 12-75-103 (2).

K. **Disease:** An interruption, cessation, or disorder of a body function, system, or organ; a departure from a state of health. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

L. **Emergency Responder:** any paid or volunteer person or entity with special skills, qualifications, training, knowledge, or experience in the public or private sectors that would be beneficial to an emergency jurisdiction in an emergency declared under Arkansas Code Annotated § 12-75-108 or training exercises authorized by the United States Department of Homeland Security, the Arkansas Department of Emergency Management, or an emergency jurisdiction; and who is either:

- (a) Requested by a participating emergency jurisdiction to respond or assist with a declared emergency or with authorized training exercises;
- (b) Authorized to respond or assist a participating emergency jurisdiction with a declared emergency or with authorized training exercises; or
- (c) Both requested and authorized to respond or assist a participating emergency jurisdiction with a declared emergency or with authorized training exercises.

An emergency responder may include, without limitation, the following types of personnel:

- (i) Law enforcement officers;
- (ii) Firefighters;
- (iii) Hazardous material response personnel;
- (iv) Decontamination response personnel;
- (v) Certified bomb technicians;
- (vi) Emergency medical services personnel;
- (vii) Physicians;
- (viii) Nurses;
- (ix) Public health personnel;

- (x) Emergency management personnel;
- (xi) Public works personnel;
- (xii) Members of community emergency response teams;
- (xiii) Emergency personnel of nongovernmental organizations; and
- (xiv) Persons with specialized equipment operations skills or training or any other skills valuable to responding or assisting a participating emergency jurisdiction with a declared emergency or with authorized training exercises.

An Emergency Responder includes any full or part-time paid, volunteer, or auxiliary employee of the state, another state, a territory, a possession, the District of Columbia, the federal government, any neighboring country, or any political subdivision thereof, or of any agency or organization performing emergency *management* services at any place in this state subject to the order or control of, or pursuant to, a request of the state government or any political subdivision. Ark. Code Ann. § 12-75-103(7), *as amended* by § 22 of 2009 Act 165.

M. **Epidemic**: The occurrence in a community or region of cases of illness or health-related events clearly in excess of normal expectancy. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

N. **Epidemiology**: The study of the distribution and determinants of health-related events in specified populations, and the application of this study to control of health problems. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

O. **Evacuation**: Organized, phased, and supervised withdrawal, dispersal, or removal of civilians from dangerous or potentially dangerous area, and their reception and care in safe areas. FEMA, National Response Framework Resource Center Glossary/Acronyms at <http://www.fema.gov/emergency/nrf/glossary.htm#E>.

P. **First Responders**: State and local law enforcement personnel, fire department personnel, and emergency medical personnel who will be deployed to bioterrorism attacks, terrorist attacks, catastrophic or natural disasters, and emergencies. Ark. Code Ann. § 20-13-1201(5). *See also* "Emergency responder."

Q. **Health Care Facility**: (A) "Health care facility" means any institution, building, or agency or portion thereof, private or public, excluding federal facilities, whether organized for profit or not, used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any person or persons. (B) "Health care facility" includes, but is not limited to, ambulatory surgical facilities, health maintenance organizations, home health agencies, hospices, hospitals, infirmaries, kidney treatment centers, long-term care facilities, medical assistance facilities, mental health centers, outpatient facilities, public health

centers, rehabilitation facilities, residential treatment facilities, and adult day care centers. Ark. Code Ann. § 20-13-901(8).

R. **Health Care Provider**: A person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession. Ark. Code Ann. § 20-17-201(4).

S. **Host**: The organism in or on which a parasite lives and derives its body substance or energy from. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

T. **Incubation Period**: The period of time between a disease agent's entry into an organism and the organism's initial display of disease symptoms. During the incubation period, the disease is developing. Incubation periods are disease-specific and may range from hours to weeks. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

U. **Individually Identifiable Health Information**: Any information, including demographic information collected from an individual, that is created or received by a health care provider, health plan, employer, or health care clearinghouse; relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; identifies the individual, or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual. 42 U.S.C. § 1320d(6).

V. **Infectious Agent**: A microorganism that causes infectious disease through transmission. Stedman's Medical Dictionary (27th Ed. 2000).

W. **Infectious Disease**: A disease resulting from the presence and activity of a microorganism. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

X. **Infectious Waste**: See "Medical waste."

Y. **Isolation**: The separation, for the period of communicability, of known infected persons in such places and under such conditions as to prevent or limit the transmission of the infectious agent. Lawrence A. Gostin, Public Health Law: Power, Duty, Restraint 210 (2000).

Z. **Medical Waste**: Waste from health care related facilities, which, if improperly treated, handled, or disposed of may serve to transmit an infectious disease and which includes the following: pathological wastes; liquid or semi-liquid blood, blood components or products or other human body fluids (see list in statute); contaminated items which cannot be laundered; disposable, single-use gloves and protective coverings; microbiological waste; and contaminated sharps. Ark. Code Ann. § 20-32-101(5).

AA. **Notifiable Disease**: A disease that, by statutory requirements, must be reported to the public health or veterinary authorities when the diagnosis is made because of its importance to

human or animal health. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

BB. **Notifiable Diseases and Conditions:** Diseases and conditions that are required to be reported to the Department of Health under the Arkansas State Board of Health Rules and Regulations Pertaining to Communicable Disease § V.

CC. **Nosocomial:** Denoting a new disorder (not the patient's original condition) associated with being treated in a hospital, such as a hospital-acquired infection. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

DD. **Outbreak:** A sudden rise in the number of cases of a disease, usually during a specified period and in a specified population. Stedman's Medical Dictionary (27th ed. 2000).

EE. **Pathological Waste:** All human unfixed tissues, organs, and anatomical parts, other than intact skin, which emanate from surgeries, obstetrical procedures, dental procedures, autopsies, and laboratories. Such waste shall be exclusive of bulk formaldehyde and other preservative agents. Ark. Code Ann. § 20-32-101(5)(A). *See* "Medical Waste."

FF. **Protected Health Information:** Individually identifiable health information that is transmitted or maintained by electronic media or in any other form or medium. Protected health information excludes individually identifiable health information in employment records held by the Facility in its role as employer. 45 C.F.R. § 160.103; *see also*, Title V of Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102.

GG. **Public Health:** the art and science of community health, concerned with statistics, epidemiology, hygiene, and the prevention and eradication of epidemic diseases; an effort organized by society to promote, protect, and restore the people's health; public health is a social institution, a service, and a practice. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

HH. **Public Health Emergency:** An occurrence or imminent threat of an illness or health condition that: (a) is believed to be caused by (i) bioterrorism, (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin, or (iii) a natural disaster, chemical attack or accidental release, or nuclear attack or accidental release; or (b) poses a high probability of (i) a large number of deaths in the affected population, (ii) a large number of serious or long-term illnesses in the affected population, or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population. Model State Public Health Act § 1-102(45)(Sept. 2003). *See also* "Disaster."

II. **Public Health Official:** The head officer of any state or local public health agency who is responsible for the operation of the agency and has the authority to manage and supervise the agency's activities. Model State Public Health Act § 1-102(47)(Sept. 2003).

JJ. **Quarantine:** The restriction of the activities of healthy persons who have been exposed to a communicable disease, during its period of communicability, to prevent disease transmission

during the incubation period if infection should occur. Lawrence A. Gostin, Public Health Law: Power, Duty, Restraint 210 (2000).

KK. **Sample:** A relatively small quantity of material, or an individual object, from which the quality of the mass, group, species, etc. which it represents may be inferred; a selected subset of a population. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

LL. **Screen:** To systematically apply a test or exam to a defined population. Model State Public Health Act § 1-102(55)(Sept. 2003).

MM. **Surveillance:** A type of observational study that involves continuous monitoring of disease occurrence within a population. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

NN. **Toxin:** A harmful or poisonous substance that is formed during the metabolism and growth of certain microorganisms and some plant and animal species. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

OO. **Transmission:** The conveyance of disease from one organism to another. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

PP. **Vector:** An invertebrate animal (e.g. tick, mite mosquito, bloodsucking fly) capable of transmitting an infectious agent among vertebrates. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

QQ. **Virus:** A term for a group of infectious agents that is incapable of growth or reproduction apart from living cells. A complete virus usually includes either DNA or RNA and is covered by a protein shell. Viruses range in size from 15 nanometers to several hundred nanometers. Classification of a virus depends upon its physiochemical characteristics, mode of transmission, host range, symptomatology, and other factors. Many viruses cause disease. Stedman's Online Medical Dictionary at <http://www.stedmans.com/section.cfm/45> (27th ed. 2000).

INTRODUCTION

Public health law has been defined by one scholar as:

The study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, propriety, or other legally protected interest of individuals for the protection or promotion of community health.

Lawrence A. Gostin, *Public Health Law: Power, Duty, Restraint* 4 (2000). One important aspect of a public health lawyer's role is to help prepare the community and the government for public health emergencies. Public health emergency is a broad term that can encompass many situations and occurrences that threaten the health and safety of large populations. Examples of public health emergencies include everything from winter storms, summer heat waves, power outages, and transportation accidents to earthquakes, hurricanes, tornadoes, floods, and fires, hazardous waste spills, terrorist attacks and outbreaks of epidemics or pandemics. Whatever the public health emergency, public health professionals must be prepared and ready to respond when it happens. Legal preparedness for public health emergencies includes the attainment, by any agency, organization, or jurisdiction, of the legal standards necessary to address any emergency threat to the public's health. Tony Moulton, Ph.D., Center for Disease Control and Prevention, *Presentation on Building Public Health Emergency Legal Preparedness* (Oct. 21, 2008). Legal preparedness is crucial to successful public health planning. Being prepared legally for a public health emergency includes having adequate legal authorities in place, knowing of those legal authorities, presenting accessible legal information to the public health officials in your community or state, ensuring those public health officials can competently apply the relevant laws in an emergency, and enabling public health officials to coordinate actions

across government agencies and jurisdictions and with the public sector. Public health officials must become familiar with public health legal authorities in their jurisdiction, identify and address any potential legal issues, draft documents for use in a public health emergency, plan for due process procedures, and engage the courts in advance of the emergency.

One of the State's most important public health emergency legal preparedness tools is the Arkansas Emergency Services Act (AESA). See Ark. Code Ann. §§ 12-27-101 et seq., *as amended* by 2009 Act 165. The purpose of AESA is to “authorize and provide for a disaster management system embodying all aspects of predisaster (sic) preparedness and post-disaster response.” *Id.* at § 102(b). AESA was enacted because of the increasing possibility of a major emergency or disaster of unprecedented seriousness and destructiveness and is designed to deal with such events in a “timely, coordinated, and efficient manner, and generally to provide for the common defense and protect the public peace, *health*, safety, and preserve the lives and property of the state.” *Id.* at § 102(a) (emphasis added). AESA provisions will be discussed throughout this bench book; therefore, it is helpful to have a basic understanding of how it operates.

Many of the powers designated to the Arkansas Department of Emergency Management (ADEM) and the Governor of Arkansas under AESA are triggered by the Governor's declaration of a disaster. *Id.* at §§ 101 et seq. Because of this, it is helpful to understand what a disaster is and when it can be declared. “Disaster,” as defined by AESA, is a broad term that encompasses natural disasters, hazardous material contamination, “or other catastrophe[s], whether caused by natural forces, enemy attack, or any other means” which the Governor, the Director of ADEM, or his or her designee determines or anticipates to be:

of sufficient severity and magnitude to warrant state action or to require assistance by the state to supplement the efforts and available resources of local governments and relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby, and with respect to which the

chief executive of any political subdivision in which the disaster occurs or threatens to occur certifies the need for state assistance and gives assurance of the local government for alleviating the damage, loss, hardship, or suffering resulting from such disaster; or . . .results in an interruption in the delivery of utility services when emergency declarations are required and when delays in obtaining an emergency declaration from the Governor or the director or his or her designee would hamper and delay restoration of utility service.

Ark. Code Ann. § 12-75-103(2). Once a disaster has been declared, ADEM, the Governor, and other specified actors may exercise powers that are enumerated within the act to prevent and reduce health and safety problems.

All public health preparedness measures and emergency response plans and programs should use the all hazards approach, adopted by the Federal Emergency Management Agency (FEMA). FEMA's all hazards approach includes "direction, control, and warning systems which are common to the full range of emergencies from small isolated events to the ultimate emergency—war." History of FEMA, www.fema.gov/about/history.shtm (last visited on November 11, 2008).

PART ONE: BENCH GUIDES

The bench guides are designed to address particular public health issues that the court is likely to face in an emergency. Many of these issues require the court to balance the state's interest in protecting the public's health and safety against the citizen's rights to and interests in privacy, property and autonomy. For example, the court may have to decide when the state can force an individual to undergo medical treatment, to submit to quarantine, or to forfeit their property.

Arkansas law does not provide specific guidance on every issue that the court might have to face, so some extrapolation is required. Arkansas does have a specific regime in place for controlling the spread of tuberculosis (TB). Both statutory and regulatory laws govern when a court can infringe on an individual's rights to stop the spread of TB. Because those statutes and regulations are so detailed and specific in their guidance, the Arkansas Department of Health (ADH) recommends that they be used as a guide in other public health situations calling for involuntary medical testing, treatment, or quarantine. For this reason, the TB laws are discussed throughout the bench guides along with other statutes, rules, and regulations.

SECTION ONE: INVOLUNTARY MEDICAL EXAMINATION FOR COMMUNICABLE DISEASES

The Fourth Amendment to the U.S. Constitution provides all people "the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This amendment requires that any search or seizure conducted by a state official is reasonable and its application is not limited to law enforcement officers conducting a criminal investigation, but includes any search or seizure by a state actor. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). When government action infringes on some expectation of privacy that

society recognizes as reasonable, a search has occurred. *See U.S. V. Jacobsen*, 466 U.S. 109, 113 (1984). A “seizure” occurs when the government meaningfully interferes with an individual’s freedom of movement. *See Michigan v. Summers*, 452 U.S. 692, 696, n.5 (1981). In other words, a seizure occurs when a reasonable person would not feel free to leave. *See id.*

For the Government to lawfully conduct a search or seizure, the action must be reasonable. Since the Supreme Court has recognized that the collection and analysis of biological samples is a “search” under the Fourth Amendment, involuntary medical testing must be analyzed for its constitutionality, i.e., its reasonableness. *See Gostin, supra*, at 196. The Court has held that the warrant and probable cause requirements of the Fourth Amendment are not always applicable when a state has “special needs beyond the normal need for law enforcement.” *Id.* (citations omitted). In determining the constitutionality of a screening program the Court will balance the individual’s right to privacy against the Government’s stated interest to determine if individualized suspicion or probable cause is needed to warrant the search. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989). The Court typically accepts the state’s assertions of a public health purpose for mandatory testing, *see Gostin, supra*, 196; therefore, it is unlikely that the state’s actions in requiring involuntary medical testing or examination in the face of a public health emergency will be found unconstitutional when the balancing test is applied.

A. Under What Circumstances May A Court Order An Individual To Submit To Medical Testing Or Examination?

Under current Arkansas law, certain situations allow the state to force an individual to undergo involuntary medical testing. Those situations are outlined below.

According to the Arkansas State Board of Health (the “Board”) Rules and Regulations Pertaining to Communicable Disease, § VII, the Director of ADH (the “Director”) has the following responsibilities:

When the Director has knowledge, or is informed of the existence of a suspected case or outbreak of a communicable disease:

A. The Director shall take whatever steps necessary for the investigation and control of the disease.

B. If the Director finds that the nature of the disease and the circumstances of the case or outbreak warrant such action, the Director shall make, or cause to be made, an examination of the patient in order to verify the diagnosis, make an investigation to determine the source of the infection, and take appropriate steps to prevent or control spread of the disease.

Pursuant to this regulation, the Director may cause an individual to be examined or investigated in order to arrive at a medical diagnosis or to find the source of the disease. The regulations also grant the Director specific authority to cause an individual to undergo a medical examination. Section XXI (D) of the says:

Whenever the director of the Arkansas Department of Health has reasonable grounds to believe that any person is suffering from Syphilis, Gonorrhea, Chancroid, Lymphogranuloma Venereum or Granuloma Inguinale in a communicable state, he is authorized to cause such a person to be apprehended and detained for the necessary tests and examinations, including an approved blood serologic test and other approved laboratory tests, to ascertain the existence of said disease or diseases: provided, that any evidence so acquired shall not be used against such person in any criminal prosecution.

This section grants the Director certain powers only when he reasonably suspects an individual is suffering from certain sexually transmitted diseases. Arkansas Code Annotated § 20-15-703(a) applies to TB and can be extrapolated to other outbreaks of communicable diseases. That section says:

when the state, county, or city health officer shall have reasonable grounds to believe that any person has Tuberculosis (TB) in an active state or in a communicable form and who will not voluntarily seek medical examination or treatment, the health officer may cause the person to be apprehended and detained for the necessary tests and examinations, including an approved chest X-ray, sputum examination, and other approved laboratory tests to ascertain the existence of TB.

All of the provisions outlined above specify certain diseases the government may test for when they have reasonable grounds to believe an individual is suffering from or carrying one of them. The Board also has the power and duty to protect the public's health and safety, suppress and prevent infectious or communicable diseases within the state, and enforce quarantine, isolation, and control of such diseases. Ark. Code Ann. § 20-7-109(a)(1). Through rules and regulations the Board has conferred that power on the Arkansas Department of Health. Logically, this means the Department may cause some individuals within its jurisdiction to submit to medical testing to determine the cause of the epidemic or communicable disease.

A School Board may appoint and provide payment for a physician or nurse for the purpose of making physical examinations of the students as required by the State Board of Education. Ark. Code Ann. § 6-18-701(a). The examination may be for the purpose of detecting contagious or infectious diseases. Id. at § 701(b). They may be done whenever such examinations for infectious diseases are "deemed necessary." Id. at § 701(c).

The Arkansas Livestock and Poultry Commission (Livestock and Poultry Commission) is charged with investigating and preventing the spread of diseases in animal populations. Ark. Code Ann. § 2-33-107(a)(1); Ark. Code Ann. § 2-40-103. The Livestock and Poultry Commission has a duty to cooperate with appropriate state and federal agencies

for the purpose of coordinating laws, rules, and regulations governing the interstate movement of livestock and poultry, and the product producible therefrom, with the view of safeguarding against animal diseases, insects,

and pests and at the same time endeavoring to eliminate interstate trade barriers.

Id. at § 2-33-107(b)(3). At times, the Livestock and Poultry Commission's authority overlaps with and intersects with ADH's authority to regulate the spread of diseases in human populations. To be in compliance with ADH's rules and regulations, any commercial animal or fowl operation must be in compliance with all of the Livestock and Poultry Commission's rules and regulations. Ark. State Board of Health Rules and Regs. Pertaining to Gen'l Sanitation § IX(B). For this reason, the statutes governing the Livestock and Poultry Commission will be mentioned throughout the Bench Book, where appropriate.

The Livestock and Poultry Commission has the authority to inquire into all outbreaks of contagious or infectious diseases of animals. Ark. Code Ann. § 2-40-103(a)(1). Certainly, pursuant to this authority, the Commission may investigate any disease outbreaks in an animal population. It is likely that this power to investigate includes the power to test or screen certain animals for the disease, particularly diseases that effect human populations.

B. What Is The Procedure To Order Involuntary Medical Testing Or Examination?

The rules and statutes governing venereal diseases and TB are the only laws that specifically grant the state the authority to mandate medical examinations. The Board has the power to make necessary rules and regulations for the protection of the public's health and safety; the suppression and prevention of infectious, contagious, and communicable disease; and the proper *control* of such diseases. Ark. Code Ann. § 20-7-109(a)(1)(emphasis added). The language of this statute indicates that the Board can promulgate rules and regulations mandating medical examinations in many situations that would threaten the public's health. If the Board chooses to exercise this power in an emergency setting, the procedures laid out for mandatory testing of specific communicable diseases will most likely be the guide.

To require an individual to undergo medical testing for a venereal disease under § XXI(D) of the Rules and Regulations Pertaining to Communicable Disease, the Director must have reasonable grounds to believe the individual is a carrier. Likewise, when a “state, county, or city health officer shall have reasonable grounds to believe that any person has TB in an active state or a communicable form and who will not voluntarily seek a medical examination or treatment,” the officer may apprehend and detain the person for necessary tests and examinations. Ark. Code Ann. §§ 20-15-703(a); Ark. State Board of Health Rules and Regs. Pertaining to Communicable Diseases (TB) § XIV(A)(1). Associate Justice Ward said in his concurring opinion that the statute empowers a court to send an individual to the state TB sanatorium for examination and treatment if the court finds that 1) there are reasonable grounds to believe the person has TB and 2) the person refuses to be examined. *State v. Snow*, 230 Ark. 746, 751, 324 S.W.2d 532, 535 (1959). If the court does not find that those two requirements have been met, then the individual must be released. *Id.*

The AESA does not contain provisions that specifically grant the Governor or any other agency or official the power to require individuals to undergo medical examination during an emergency. Arkansas Code Annotated § 12-75-110(a), *as amended* by § 32 of 2009 Act 165, however, grants ADEM the power to coordinate and maintain a state emergency operations plan and charges it with keeping this plan current. This emergency operations plan can include methods to prevent and minimize *injury and damage* caused by a disaster, identification of areas particularly vulnerable to disasters, and “other necessary matters.” *Id.* (emphasis added). The definition of disaster includes catastrophes, “whether caused by natural forces, enemy attack, or any other means.” *Id.* at § 103(2). The language of the AESA seems to grant the ADEM broad authority to plan for disasters, including steps to test individuals for communicable diseases in

order to prevent their spread. If ADEM chooses to exercise the authority granted it under AESA to plan for communicable disease outbreaks by creating mandatory testing programs, then the most likely guide will be the statutes and regulations governing TB testing and venereal disease testing.

C. What Remedies Are Available If An Individual Refuses Medical Testing Or Examination?

Any violation of the Rules and Regulations Pertaining to Communicable Disease, the Rules and Regulations Pertaining to Tuberculosis, any provisions of the statutes governing the State Board of Health and ADH (Ark. Code Ann. §§ 20-7-101 et seq.), or any other rules and regulations promulgated under it is a violation of Arkansas Code Annotated § 20-7-101(a)(1). A violation of § 20-7-101(a)(1) is considered a misdemeanor and if an individual is convicted he or she shall be punished by a fine of \$100 to \$500 dollars or no more than one month in prison or both. *Id.* Each day of violation is a separate offense. *Id.* at § 101(a)(2).

Any individual who violates a provision of the TB subchapter (Ark. Code Ann. §§ 20-15-701 et seq.) and is convicted may be fined \$25 to \$100. *Id.* at § 20-15-702.

A public health practitioner should take steps to communicate the need for medical testing or examination to an individual suspected of being infected. Such culturally appropriate explanations could avoid the imposition of these penalties and avoid costly and inefficient judicial actions.

D. Who Is Responsible For The Cost Of Involuntary Medical Testing Or Examination?

There is no specific authority allocating the cost of mandatory medical testing to the State or the individual who must undergo the testing. Arkansas Code Annotated § 20-7-130, however, authorizes the state to recover expenditures for “extraordinary operations.” The purpose of § 130 is to “more equitably allocate the costs between the state and responsible parties when

unforeseen circumstances arise as a result of accidents and other man-made causes which require assistances from the Department of Health.” On its face, this statute does not appear to allow the State to recover the costs of involuntary medical examinations from the individuals forced to undergo them. It specifies that it is designed to recover expenditures for “accidents and other man-made causes” and then lists examples such as transportation accidents involving food and drugs, environmental contaminations, and food product contaminations. *Id.*

E. When Should Informed Consent Be Considered?

Some statutes allowing the state to mandate medical testing contemplate informed consent. For example, under Arkansas Code Annotated § 20-16-507(a)(1)(A),

Every physician attending a pregnant woman shall take, or cause to be taken, a sample of venous blood at the time of first examination and submit such sample to an approved laboratory for a standard serologic test for Syphilis; a standard test for Human Immunodeficiency virus; and a standard test for Hepatitis B. Any person other than a physician permitted by law to attend pregnant women but not permitted by law to take blood samples, shall cause a specimen of blood to be taken by, or under the direction of a physician duly licensed to practice medicine and surgery, and have such specimen submitted to an approved laboratory for testing (of certain venereal diseases).

If the patient refuses to be tested, the physician or medical professional is relieved of all responsibility under the statute if they document the refusal on the patient’s chart. *Id.* at § 507(a)(1)(B). This type of routine screening allows the patient to opt out, whereas the provisions allowing testing for TB and other Venereal Diseases state that the Director of the Department of Health or other official may *apprehend and detain* the individual for testing, indicating they may not opt out of testing under those regulations. Under the TB regulations and the rules governing testing for venereal diseases, informed consent must be weighed against the protection of the public’s safety. In balancing these interests, the State may not always have to obtain consent.

SECTION TWO: INVOLUNTARY TREATMENT FOR COMMUNICABLE DISEASES

Citizens have a right to refuse medical treatment; however, this right can be outweighed by the Government’s interest in protecting the public’s health and safety when a dangerous situation threatens it. *See Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *State v. Snow*, 230 Ark. 746, 748, 324 S.W.2d 532, 534 (1959). Arkansas routinely imposes medical treatment on individuals in the form of vaccinations, which are required of all children before enrolling in a public or private school in the state. Ark. Code Ann. § 6-18-702(a) (there are some exceptions to the vaccination requirement, for example a child may be exempted if the parent or guardian objects based on his or her religious or philosophical beliefs).^{*} In what other situations may the State force an individual to undergo medical treatment?

A. Under What Circumstances May The Court Order An Individual To Submit To Treatment For A Communicable Disease?

The Arkansas State Legislature has granted to the Board of Health the “general supervision and control of all matters pertaining to the health of the citizens of the state.” Ark. Code Ann. § 20-7-110(a)(1). More specifically, the Board has the power to protect the public’s health and safety; suppress infectious, contagious, or communicable diseases; and enforce quarantine, isolation and *control of those diseases*. *Id.* at § 109(a)(1)(emphasis added). The Director of ADH has the power to take whatever steps necessary for the investigation and control of a suspected or actual case or outbreak of a communicable disease. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease § VII(A). The Director may also take such steps as are appropriate to prevent the spread of the disease if he or she finds that the nature and circumstances of the situation warrant such action. *Id.* at § VII(B). The language of these

^{*} House Bill 1253 was pending before the General Assembly at the time of publication. If passed it will amend Arkansas Code Annotated § 6-18-702.

statutory provisions and regulations suggest that the Board and ADH may have the power to mandate involuntary treatment of any recognized communicable disease; however, the only statute specifically granting this power is in the TB subchapter of Arkansas Code Annotated Title 20.

The TB regulations allow the local health officer to impose mandatory treatment on a carrier under certain circumstances. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease (TB) § XIV. If the TB carrier will not submit to voluntary medical treatment and the circumstances are not suitable for proper isolation or control by local quarantine the local health officer may petition the court to have the carrier committed to a facility equipped to treat TB. Ark. Code Ann. § 20-15-704(a); Ark. State Board of Health Rules and Regs. Pertaining to Communicable Diseases (TB) § XIV(B)(1).

B. What Is The Procedure For Issuing A Court Order For Involuntary Treatment Of A Communicable Disease?

The procedure for ordering the involuntary treatment of a TB carrier is laid out in both statutes and regulations. This procedure is the most detailed description of how a state actor can mandate treatment of a communicable disease. A local, city, or state health officer must petition the circuit court of the county where the infected individual is found to have him or her committed to a facility that is equipped to treat TB. Ark. Code Ann. § 20-15-704(a); Ark. State Board of Health Rules and Regs. Pertaining to Communicable Diseases (TB) § XIV(B)(1). The court must have a hearing to determine the following three things: 1) the circumstances are not suitable for proper isolation and control through local quarantine procedures, 2) the person with TB will not seek voluntary medical treatment, and 3) he or she poses a danger to others. Ark. Code Ann. § 20-15-707(a); Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease (TB) § XIV(B)(2). The petitioner, or health officer, must prove these

things by sufficient and competent evidence before the court can order the commitment of the individual to a facility that treats TB. *State v. Snow*, 230 Ark. 746, 747; 324 S.W.2d 532, 533 (1959). The notice of the hearing must be served personally upon the infected individual at least seven days before the hearing is scheduled. Ark. Code Ann. § 20-15-705(a); Ark. State Board of Health Rules and Regs. Pertaining to Communicable Diseases (TB) § XIV(C)(1). The respondent, or person infected with TB, has a right to counsel of his or her own choosing. Ark. Code Ann. § 20-15-706; Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease (TB) § XIV(D). In the event of an outbreak of a communicable disease other than TB, the ADH or Board should follow similar procedures in mandating the isolation and treatment of individuals diagnosed with the disease.

C. **What Remedies Are Available To The Court If An Individual Defies A Court Order?**

Under the TB subchapter of the Public Health and Welfare Title, any person who leaves or attempts to leave a treatment institution without being properly discharged is guilty of a misdemeanor. Ark. Code Ann. § 20-15-710(b). The punishment, upon conviction, is imprisonment for six months to one year. *Id.*

A violation of any provision of the TB subchapter can result in a fine of \$25 to \$100 dollars upon conviction. *Id.* at § 702. Also, a violation of the TB rules and regulations is considered a violation of Arkansas Code Annotated § 20-7-101. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Diseases (TB) § V(A). Arkansas Code Annotated § 20-7-101(a) states that a violation of the specified provisions is a misdemeanor. A conviction can result in a fine of \$100 to \$500, up to one month of imprisonment, or both. Ark. Code Ann. § 20-7-101(a).

An individual may also be ordered into isolation if he or she has been diagnosed with a communicable disease and refuses to comply with medical orders. Also, healthy family members of a patient may be ordered into quarantine to prevent the spread of a communicable disease. See Part I, Section Three: Isolation and Quarantine.

D. May The Court Order A Pre-Hearing Detention?

The court may order a pre-hearing detention of the person suspected of carrying active or communicable TB. Arkansas Code Annotated § 20-15-705(b) says that “while the petition is pending, the person shall be subject to the local quarantine or restrictions of his or her movements placed on him or her by the health officer for the protection of the public health.”

E. Who Is Responsible For The Cost Of Involuntary Treatment?

Like the mandatory testing and examination provisions, there is no specific authority allocating the cost of mandatory medical treatment to the State or the individual who must undergo the treatment. The State will have to rely on Arkansas Code Annotated § 20-7-130, which authorizes the state to recover expenditures for “extraordinary, time-consuming operations.” The purpose of § 130 is to “more equitable allocate the costs between the state and responsible parties when unforeseen circumstances arise as a result of accidents and other man-made causes that require assistances from the Department of Health.” On its face, this statute does not appear to allow the State to recover the costs of involuntary medical examinations from the individuals forced to undergo them because the statute specifies that it is designed to recover expenditures for “accidents and other man-made causes” and then lists examples such as transportation accidents involving food and drugs, environmental contaminations, and food product contaminations. *Id.* at § 130(a).

F. When Should The Court Consider Informed Consent?

Generally, a doctor must obtain informed consent before treating any individual for any reason. *See* Ark. Code Ann. § 20-9-601 et seq.; Rules and Regs. for Hosps. and Related Insts. in Ark. § 14(D)(1)(l); *Taylor v. Landherr*, 101 Ark. App. 279, 283, --S.W.3d-- (2008) (failure to obtain informed consent can result in a medical malpractice claim). In the face of an epidemic, however, the state may not be able to allow an individual to refuse medical treatment. The TB statutes contemplate that there may be some circumstances when the state cannot consider informed consent. In fact, the purpose of the TB statutes is to require individuals who pose a threat to the health of the community to be committed to a TB treatment facility and undergo treatment. *See* Ark. Code Ann. § 20-15-707.

SECTION THREE: QUARANTINE AND ISOLATION

Quarantine is defined as the “restriction of activities of healthy persons who have been exposed to a communicable disease, during its period of communicability, to prevent disease transmission during the incubation period if infection should occur.” Gostin, *supra*, at 210. Isolation, on the other hand, is the separation, for the period of communicability, of known infected persons in such places and under such conditions as to prevent or limit the transmission of the infectious agent. *Id.*

The Board has the power to direct and control all matters of quarantine regulation and enforcement and the full power and authority to prevent the entrance of certain diseases from outside the state. Ark. Code Ann. § 20-7-110(a)(2)—(3). The Governor may direct the Board to take such actions as necessary to protect the public in the event of an epidemic or contagious disease in this or an adjoining state. *Id.* at § 110(b). The Board of Health has some authority to quarantine and isolate patients with communicable diseases. *Id.* at § 109(a)(1)(D). The

Arkansas Board of Health Rules and Regulations Pertaining to Communicable Disease outline the powers and responsibilities of certain actors when a patient is isolated or quarantined.

The Federal Government also has the power to regulate in order to control communicable diseases. 42 U.S.C. § 264(a). If a communicable disease is specifically designated by the President for regulation, the Secretary of Health and Human Services may promulgate, or issue, regulations for the apprehension, detention, and conditional release of individuals designed to control that disease. *Id.* at § 264(b). The President has granted the Secretary the authority to regulate several communicable diseases, including TB, Severe Acute Respiratory Syndrome (SARS), and influenza caused by novel or reemergent flu influenza viruses that are causing, or have the potential to cause a pandemic. Exec. Order No. 13295, 68 F.R. 17255 (2003), *as amended by* Exec. Order No. 13375, 70 F.R. 17299 (2005).

A. What Is The Procedure For Quarantine Or Isolation?

“No person shall be taken or imprisoned, or disseized of his estate, freehold, liberty, or privileges; or outlawed, or in any manner destroyed or deprived of his life, liberty, or property, except by the judgment of his peers or the law of the land; nor shall any person, under any circumstances, be exiled from the state.” Ark. Const. Art. II § 21. To protect the rights guaranteed by this article of its constitution, the State must follow the correct procedures to quarantine or isolate an individual.

Arkansas Code Annotated § 20-7-109(b) states that a person “shall not be removed from his home without his consent or the consent of his parents or guardians” if he or she can be treated with reasonable safety to the public’s health. According to the Rules and Regulations Pertaining to Communicable Disease § VII, the Director of ADH must “make, or cause to be made, an examination of the patient in order to verify the diagnosis, make an investigation to

determine the source of the infection, and take appropriate steps to prevent or control the spread of the disease,” when he finds that the nature of the disease or the circumstances of the outbreak warrant such action. This sentence and other Communicable Disease Rules and Regulations grant the Director authority to quarantine and isolate patients with communicable diseases to protect the public’s health, but only if evidence from the initial disease report and subsequent examination support such isolation or quarantine.

Also, when exercising the power to quarantine and isolate patients to prevent the spread of communicable disease, officials must ensure the due process requirements of notice, hearing and appeal are protected. Although no statute explicitly applies these requirements to the procedures for general isolation and quarantine, notice and hearing are required under the due process clause of the U.S. Constitution as applied to the states through the Fourteenth Amendment. U.S. Const., Amend. XIV, § 1 (“nor shall any state deprive any person of life, liberty, or property, without due process of law”). Accordingly, the state statute regarding tuberculosis requires that the patient be provided notice, a hearing, and the opportunity to appeal before he or she may be ordered into isolation or quarantine. *See* Ark. Code Ann. § 20-15-701 et seq.; *State v. Snow*, 230 Ark. 746, 748, 324 S.W.2d 532, 534 (1959) (the TB statutes are to be “strictly construed to protect the rights of the citizen”). The state has the right to impose local quarantine and other restrictions on the patient pending the initial hearing. Ark. Code Ann. § 20-15-705(b). It is unclear whether or not the state can require a patient to remain in the TB facility pending the appeal, but, most likely, it can.

1. Isolation

Pursuant to Arkansas Code Annotated § 20-7-109(a)(1)(C) & (D), the Board has the authority to regulate the “proper enforcement of quarantine, isolation, and control” of

communicable diseases and the suppression and prevention of communicable diseases. The Board has exercised this authority and promulgated rules that govern isolation of patients who are diagnosed with a communicable disease.

The attending physician must cause a patient to be isolated immediately following the discovery of a disease that would require isolation. Ark. Board of Health Rules and Regs. Pertaining to Communicable Disease § IX. This immediate isolation is pending any final action by the Director of ADH. *Id.* The physician also has a duty to inform other members of the patient's household of any precautions they should take to prevent further spread of the disease and of any specific preventative measures. *Id.* He or she shall also provide the patient's attendant with detailed instructions on how to disinfect or dispose of any infective secretions or excretions as directed by the Director. *Id.*

Further, any child, teacher, or employee of a public or private school or childcare facility must be excluded from the premises until the individual is certified free of disease by a written notice from a physician, school nurse, public health nurse, or the ADH. *Id.* at § XIV. The principal or person in charge of the school or childcare facility is responsible for ensuring the exclusion of an infected individual. *Id.*

All hospitals or facilities licensed by ADH must have rooms for patients who are suffering from airborne infections at a rate of one room for every 30 beds. Rules and Regs. for Hosps. and Related Insts. in Ark. § 48(C). These airborne infection isolation rooms must meet very specific regulatory requirements. *Id.*

The statutes, rules and regulations listed above describe certain state actors' general authority to cause an individual to be isolated. The TB statutes outline a more detailed process. A health officer has special authority to cause a TB patient to be isolated in certain

circumstances. Ark. Code Ann. § 20-15-704. If the officer finds that the patient's circumstances are not suitable for isolation or contagion control of his or her case by local quarantine, then the health officer may petition the probate court of the county where the patient is located to order he or she be admitted to a state-owned or operated hospital or sanitorium or a hospital or sanitorium that is equipped to treat TB. *Id.* at § 704(a). The petition must include a summary of the facts on which the officer based his determination that the patient needed to be isolated and state that the person would not seek voluntary medical treatment and would be a source of danger to others around him. *Id.* at § 704(b). After the court receives the petition for isolation and sets a date for a hearing, it must cause notice of the petition and the time and place of the hearing to be served on the TB patient within seven days of the hearing. *Id.* at § 705(a). While the hearing is pending, the patient shall be subject to local quarantine or other restrictions placed on him or her by ADH to protect the public's health. *Id.* at § 705(b). In order to have a TB patient committed against his or her will under the provision of this statute, the state must prove their case with a "preponderance of the evidence." *Snow*, 230 Ark. at 749, 324 S.W.2d at 534.

Once the patient is released from isolation, he or she must take any measures required by ADH for the disease or condition diagnosed. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease § XI. The area where isolation occurred must be disinfected according to the ADH's instructions. *Id.*

2. Quarantine

Although the word quarantine has many legal definitions, in a public health context the word describes the limitation of a healthy individual's activities when that individual has been exposed to a communicable disease, in order to prevent the spread of the disease while it is communicable. Gostin, *supra*, at 210.

The Board has the authority to regulate quarantine pursuant to Arkansas Code Annotated § 20-7-109, which says that the Board may regulate to protect the public's health and safety; to suppress and prevent contagious, infectious, and communicable disease; and to properly enforce quarantine, isolation and control of such diseases. Pursuant to this grant of statutory authority, the Board has passed § X of the Rules and Regulations Pertaining to Communicable Disease. Section X(A) states that:

the Director shall impose such quarantine restrictions and regulations upon commerce and travel by railway, common carriers, or any other means, and upon all individuals as in his judgment may be necessary to prevent the introduction of communicable disease into the State, or from one place to another within the State.

There are two types of quarantine described in the Rules and Regulations Pertaining to Communicable Disease: complete quarantine and modified quarantine. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease § I. The Director may impose either type of quarantine for the purpose of preventing the introduction or spread of communicable disease. Complete quarantine is

the limitation of freedom of movement of such well-persons or domestic animals as have been exposed to a communicable disease, for a period of time not longer than the longest usual incubation period of the disease, in such a manner as to prevent effective contact with those not so exposed.

Id. at § I(B). Modified quarantine is “a selective, partial limitation of freedom of movement of persons or domestic animals, commonly on the basis of known or presumed differences of susceptibility, but sometimes because of danger of disease transmission.” Id. at § I(G). Examples of modified quarantine are listed in the regulations. One such example is the exclusion of children from school. Id.

The Director of ADH has the authority to impose restrictions and regulations on commerce and travel by any means upon all individuals as he or she deems necessary to prevent the introduction of communicable disease into the state, or to prevent the movement of

communicable disease from one place to another within the state. Ark. Board of Health Rules and Regs. on Communicable Disease § X(A). Only the director has this authority; no entity may impose these rules or regulations on another entity without the authority of the director. *Id.* at § X(B). No person shall interfere with the authority of the Director to move or carry from one building to another, or from one locality to another, any patient infected with a communicable disease who is deemed dangerous to the public's health. *Id.* at § X(C).

State law governs quarantine regulations until overridden or contradicted by federal legislation. *Compagnie Francaise de Navigation a Vapeur v. Board of Health*, 186 U.S. 380, 388 (1902). In fact, the federal government has passed quarantine laws. See 42 U.S.C. §§ 264—272. Pursuant to 42 U.S.C. § 264(a), the Surgeon General, with the approval of the Secretary of the Department of Health and Human Services, is “authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.” *Id.* at § 264(b). If the President of the United States issues an Executive Order on the recommendation of the Secretary and the Surgeon General which specifies certain communicable diseases to be regulated, then regulations may be promulgated which provide for the apprehension, detention, or conditional release of individuals to prevent the introduction, transmission, or spread of such diseases. *Id.* In 2003, the President issued Executive Order No. 13295, the Revised List of Quarantinable Communicable Diseases. Exec. Order No. 13295, 68 F.R. 17255 (2003), *as amended by* Exec. Order No. 13375, 70 F.R. 17299 (2005). This revised list specifies which diseases may be regulated to prevent the spread of disease.

In order to isolate or quarantine an individual who has TB, the Director of ADH files a petition with the court of proper jurisdiction as described above. The petition should be accompanied by an affidavit from the attending medical doctor who diagnosed the communicable disease. Soon after filing the initial petition, the ADH or local health department should file a motion for temporary emergency public health restraining order. The motion should include a request for temporary isolation pending the hearing. After the hearing the judge will issue an order for isolation of the patient or quarantine of an area. *See* Part Three: Model Orders, Checklists, and Petitions, B & C, Model Order for Isolation and Model Order Declaring Area Quarantine.

B. Agency Power To Quarantine And Isolate

1. Department of Health

Along with power to isolate or quarantine individuals described above, the Director of ADH has the authority to cause any livestock carcasses, parts thereof, or meat food products in official establishments he deems necessary to be quarantined, segregated or reinspected. Ark. Code Ann. § 20-60-210(c). The purpose of such quarantine, segregation, or reinspection is to prevent the entry or movement in intrastate commerce of an unwholesome or adulterated carcass, part thereof, or meat food product intended for human consumption. *Id.* at § 210(a).

2. County or District Health Department

Each county and district health department (the “department”) has the power to establish, maintain and enforce isolation and quarantine. Ark. Code Ann. § 14-262-109(a)(3). Therefore, the department may exercise physical control over property and people within their jurisdiction as it finds necessary for the protection of the public’s health. *Id.* This control over persons and property may only be exercised for the purpose of isolation and quarantine. *Id.*

3. Arkansas Livestock and Poultry Commission

The Arkansas Livestock and Poultry Commission is authorized to adopt appropriate rules and regulations regarding the isolation or quarantine of “infected, exposed, or suspected infected livestock or poultry.” Ark. Code Ann. § 2-40-209(a).

C. **Remedies Available When Someone Violates A Quarantine Or Isolation Order.**

If anyone violates a quarantine order issued pursuant to federal statutes and regulations under the direction of an Executive Order, he or she is subject to up to a \$1,000 fine or no more than a year imprisonment. 42 U.S.C. § 271(a).

Arkansas Code Annotated § 20-7-101(a)(1) states that any firm, person, or corporation violating any provisions of the act or *any rules, regulations, or orders promulgated pursuant to the act*, is guilty of a misdemeanor. This would include any rules, regulations and orders promulgated pursuant to the Board’s authority to regulate quarantine, isolation, and control of infectious, contagious, and communicable diseases. Ark. Code Ann. § 20-7-109(a)(1). If convicted, the person, firm or corporation faces a fine of \$100.00—\$500.00 or up to one month imprisonment. *Id.* at § 101(a)(1). Since the statute stipulates the fine or imprisonment may only be imposed *upon conviction*, a hearing must be held to determine if the person was in violation. Each day of a violation is a separate offense for purposes of imposing penalties. *Id.* at § 101(a)(2).

If anyone violates the quarantine rules and regulations promulgated by the Arkansas Livestock and Poultry Commission, that person shall be convicted of a Class A misdemeanor. Ark. Code Ann. § 2-40-209(b).

SECTION FOUR: MANDATORY REPORTING AND SURVEILLANCE

A. Mandatory Reporting Of Communicable Diseases

1. What Diseases must be Reported?

The Board decides which diseases must be reported and who must report them. These rules are outlined in the Rules and Regulations Pertaining to Communicable Disease. According to those rules, any disease or condition listed as notifiable under § V(A) of the Communicable Diseases Rules and Regulations must be reported to the Department within 24 hours of diagnosis. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease § IV(A). Certain disease, noted by a ** on the list, must be reported *immediately* to ADH because they are of special importance or may indicate a bioterrorism event. Id. at § V(A) (emphasis added). The regulations also list Reportable Occupational Diseases and Conditions. Id. at § V(B). Despite the § V(A) & (B) lists of reportable diseases, the rules stipulate that *any unusual disease or outbreak* must be reported immediately to ADH. Id. at § V(C) (emphasis added). The Director may order that diseases not currently listed in § V are reportable at any time as public health and necessity demands. Id. at § VI.

Pursuant to the rules and regulations governing hospitals and other health institutions, the administrator of a regulated facility, or his or her designee, must report all infectious or communicable diseases that arise in the facility to ADH. Rules and Reg. for Hosps. and Related Insts. in Ark. § 18(A)(3).

2. Who is Responsible for Reporting Communicable Disease?

Any disease or condition that is declared notifiable by § V of the Rules and Regulations Pertaining to Communicable Disease must be reported by responsible parties within twenty-four hours of initial discovery of the disease. Ark. State Board of Health Rules and Regs. Pertaining

to Communicable Disease § IV(A). The report must be made to the Communicable Disease Reporting System. *Id.* Responsible parties, or those who have a duty to report notifiable diseases or conditions, include:

1. physicians, health practitioners, and nurses;
2. superintendents and managers of dispensaries, hospitals, clinics, nursing homes, and extended care facilities;
3. any person in attendance on a case of the notifiable disease or condition;
4. the local health department; and
5. any person who determines by a laboratory examination, that a specimen yields evidence of a communicable disease;
6. a school superintendant, if there are three or more cases of a notifiable disease.

Id. at § III. The superintendent may designate another person to make the report. *Id.* Unlike the other mandatory reporters, a school superintendent or his representative must report any outbreak *immediately*. *Id.* (emphasis added).

Hospitals and related facilities are required to report all communicable diseases and occurrences which threaten the welfare, safety, or health of the public to ADH. Rules and Reg. for Hosps. and Related Insts. in Ark. § 9. The hospital's report must contain any pertinent information related to the disease or occurrence. *Id.*

3. What must be in the Report?

Any report of notifiable diseases or conditions must contain the following:

1. the reporter's name, location, and phone number;
2. the name of the disease and the onset date;
3. the patient's name (spelled out), address, phone number, age, sex, and race;

4. the attending physician's name, location, and phone number;
5. any known treatment information; and
6. any pertinent laboratory test results or other information that was used in diagnosis.

Ark. Board of Health Rules and Regs. Pertaining to Communicable Diseases § IV(A). It could be said that mandatory reporting of communicable diseases to ADH is a violation of the Federal Health Insurance Portability and Accountability Act (HIPAA). HIPAA prohibits a health care provider from disclosing protected health information unless otherwise provided by the rules. 45 C.F.R. § 164.502(a). There is an exception for disclosures required by law. *Id.* at § 164.512(a)(1). The Arkansas Bar Association takes the position that mandatory reporting under Arkansas law is permissible and does not violate HIPAA. Ark. Med. Soc'y, *AMS Physician's Legal Guide* 23 (2005). The mandatory reporting is done pursuant to a state law and the HIPAA regulations contemplate that this type of disclosure will be allowed.

B. Disclosure Of Medical Information

Medical information is highly protected under federal and state law. Under the Arkansas Freedom of Information Act (FOIA), medical records cannot be made open to the public. Ark. Code Ann. § 25-19-105(b)(2). Therefore, citizens cannot use a FOIA request to obtain medical records of another.

An individual always has access to his or her own medical records for the purposes of preparing for or participating in a legal proceeding.

In contemplation of, preparation for, or use in any legal proceeding, any person who is or has been a patient of a doctor, hospital, ambulance provider, medical health care provider, or other medical institution shall be entitled to obtain access, personally or by and through his attorney, to the information in his or her medical records. . .

Ark. Code Ann. § 16-46-106(a)(1). The patient or attorney must make a request for their records and provide a written patient authorization for their release. *Id.* The medical facility may charge a fee for copying these records, but that fee cannot exceed the amounts lined out in Arkansas Code Annotated § 16-46-106(a)(2). *Id.* The doctor may deny the patient access to his or her records based on a belief that the information contained within them would be detrimental to the patient's health or well-being. *Id.* at § 106(b)(1). The patient who was denied access to his or her medical records may select another doctor in the same type of practice to review the medical records a second time. *Id.* at § 106(b)(2)(A). If that doctor also finds that he patient should not have access to his or her medical records then the records will either not be released or be expunged of detrimental material. *Id.* at § 106(b)(3). If the second doctor finds, on the other hand, that the information contained in his or her medical record is not detrimental to the patient's health, then the records will be released to the patient, his or her guardian, or his or her attorney. *Id.* at § 106(b)(2)(B).

There may be limited access to the medical records of another individual. For example,

when a *subpoena duces tecum* is served upon a custodian of records of any hospital or physician's office duly licensed under the laws of this state in an action or proceeding in which the hospital or physician's office is neither a party nor the place where any cause of action is alleged to have arisen and such a subpoena requires the production of all or any part of the records of the hospital or physician's office related to the care or treatment of a patient in the hospital or physician's office, then it shall be sufficient compliance therewith if the custodian delivers, by hand or by registered mail to the court clerk of the officer, court reporter, body, or tribunal issuing the subpoena or conducting the hearing, a true and correct copy of all records described in the subpoena together with the custodian's affidavit.

Ark. Code Ann. § 16-46-302. When a subpoena is sent to the hospital's records custodian, the custodian must deliver the records to the clerk of the court or body issuing the subpoena. These records must be delivered to the court in a sealed envelope, which is placed inside of another

envelope. *Id.* at § 303. The records may only be opened during the deposition, hearing or trial for which their use is intended upon the direction of the judge, court, officer, body, or tribunal conducting the proceeding. *Id.* at § 304. Before directing that the inner envelope be opened, the judge, court, officer, body or tribunal must ascertain that either (1) the records were subpoenaed at the instance of the patient involved or his or her counsel of record or (2) the patient or someone authorized on his behalf to do so has consented and waived any privilege of confidentiality involved. *Id.* at § 304. Any records not introduced in evidence or required as part of the record must be returned to the entity or person from who they were received. *Id.*

Although medical records are considered confidential, authorized personnel from ADH can have access to the medical records of any hospital or related facility. Rules and Regs. for Hosps. And Related Insts. In Ark. § 14(A)(17). Also, pursuant to those rules and regulations, a hospital or related facility may transfer any “necessary medical information” with the patient when he or she is transferred to an appropriate facility, agency, or outpatient service, so long as the information is necessary for follow-up or ancillary care. *Id.* at § 6(E)(2). Pursuant to Arkansas Code Annotated § 20-7-301 et seq., all hospitals in the state must report all inpatient discharge data to the ADH. Center for Health Statistics, Ark. Dept. of Health, *Hosp. Discharge Data Submittal Guide* (draft) 13 (2009). Discharge data is the “complete billing, medical, and personal information describing a patient, the services received, and charges billed for a single inpatient hospital stay.” *Id.* at 14. ADH cannot release the data in a form that makes the patient identifiable unless required or allowed to do so by law. *Id.*

C. Surveillance

One of the most important methods of disease and infection surveillance is provided for in the Rules and Regulations for Hospitals and Related Institutions in Arkansas. Under these

regulations, each facility must develop a process that reduces the risk of endemic and epidemic nosocomial, or hospital acquired, infections in patients, health care workers, and visitors. Rules and Regs. for Hosps. and Related Insts. in Ark. § 18(A)(1). The Administrator of the facility must designate a qualified individual, either a nurse or a laboratorian, to:

1. direct surveillance activities;
2. gather and report data regarding nosocomial infections in the facility;
3. create measures for identifying, investigating and reporting nosocomial infections and communicable diseases and a system of evaluating and maintaining records of infection among patients and workers;
4. create measures of assessing and identifying patients and health care workers at risk for nosocomial infections or communicable diseases; and
5. create methods for obtaining reports of infections and communicable diseases in patients and health care workers in a way that is efficient and sufficient to stop the spread of the infection or disease; among other things.

Id. at § 18(A)(4)—(5). The system of surveillance and evaluation used by the facility must conform to the Center for Disease Control and Prevention’s (“CDC”) National Nosocomial Infections Surveillance System and any relevant CDC publications. Id. Many of the diseases which are monitored under these regulations must also be reported pursuant to the Notifiable Disease Regulations discussed above.

Arkansas Code Annotated § 20-9-1201 et seq. provides that health facilities must collect data on infection rates for various surgical site infections and other hospital acquired infections. Although the hospitals and other health facilities are required to collect the data, reporting it to ADH is voluntary. Id. at § 1203(b)(1)(A). If the facility opts to send the reports to ADH, it must comply with all the formatting and deadline requirements of the statute. Id. at § 1203(b)(1)(B).

Surveys are another way that ADH monitors health data in the state. One example of such a survey is the Behavioral Risk Factor Surveillance System (BRFSS). The BRFSS is a “standardized, random telephone survey” conducted in Arkansas under the guidance of the CDC. Behavioral Risk Factor Surveillance System, <http://www.brfss.arkansas.gov/> (last visited on Nov. 21, 2008). The Arkansas Center for Health Statistics conducts the BRFSS monthly at the rate of 400 telephone calls per month. *Id.* The information collected by the BRFSS regards personal health behaviors and is used for a variety of purposes in the state, including assessing risk factors for disease and developing interventions to decrease them. *Id.* The BRFSS survey results are also used in developing state plans to reduce the burden of disease and could prove helpful in planning for a public health emergency. *Id.*

SECTION FIVE: SEARCHING PRIVATE PROPERTY FOR PUBLIC HEALTH PURPOSES

The Fourth Amendment to the U.S. Constitution guarantees all people “the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by the government. The Fourth Amendment requires that any search or seizure by a government actor must be reasonable. *See Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989) (citations omitted). All state officials must meet the reasonable requirement of the Fourth Amendment, even those officials who are conducting civil searches and seizures. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) (citations omitted). Even though public health officials are authorized to conduct searches of private property, the official must either obtain consent of the property owner or meet the reasonableness requirements of the Fourth Amendment.

The Arkansas statutes that grant the Board and ADH the power to search private property place limits on how that authority may be used. Arkansas Code Annotated § 20-7-120(a) states that no official, agent or representative of ADH has the right to enter into any home over the

objection of the homeowner or to take charge of any child over the objection of his or her parent, guardian, custodian, or person standing *in loco parentis*. But, when may the state inspect private property to ensure the public's health?

A. **Under What Circumstances May The Court Order A Search Of Private Property For Public Health Purposes?**

1. Administrative Searches and Seizures

The Board, as well as its members, officers, and authorized agents have a general right to inspect any property, except a home, if doing so will promote or protect the public's health. This authority is granted by Arkansas Code Annotated § 20-7-112(b), which says that

The members of the Board and such other officers or persons as may at any time be authorized by the Board, without fee or hindrance, to enter, examine and survey all grounds, erections, vehicles, structures, apartments, buildings, and plans when the public health may be promoted or in any way preserved.

Not only does this statute give the Board the authority to enter into almost any building or premises, but it also imposes a duty upon any “officers and agents who have control, charge, or custody of any public structure, work, grounds, or erection, or of any plan, description, outlines, drawings, or charts relating to it” to allow and assist in the inspection and copying of any of these items by the Board or its authorized agent. *Id.* at § 20-7-112(a). The Board's general right to inspect facilities does not extend to the home. *Id.* at § 20-7-120(a). Also, the Board may not take charge of a child over the objections of the parent or guardian under this act. *Id.* This act grants a broad right of access to the members of the Board, its officers, and other authorized agents; other acts grant more specific rights to search. Under these other laws, the right to search is more limited, but the search may be of homes or may be more extensive.

Food Drug and Cosmetic Act. The Board has authority to promulgate rules and regulations under the Food Drug and Cosmetic Act (FDCA). Ark. Code Ann. § 20-56-219(a)(1).

The Board has free access to any factory, warehouse, or other facility where food, drugs, devices, or cosmetics are manufactured, stored, processed, or packed or to any vehicle being used to transport or store such goods. Ark. Code Ann. § 20-56-220(a). Free access means that the Board or its authorized agent may enter these facilities “at all reasonable hours.” Id. If the Board determines that the distribution of any class of food is injurious to health because of contamination and that the injurious nature cannot be adequately determined after the food enters the stream of commerce, then the Board shall issue permits governing the manufacture, processing, or packaging of the food. Ark. Code Ann. § 20-56-217(a). The permit may only be issued in the limited circumstance described above and must be issued for as short a time period as is necessary. Id. During the period that the permit is effective, no one other than a permit holder may introduce or deliver into commerce any food in that class. Id. Also, the permit process gives any officer or employee designated by the Board access to any facility that holds a permit for the purpose of determining whether or not the facility is meeting the conditions of the permit. Id. at § 217(c). This in effect gives the Board a limited right to search these facilities without a warrant. If the permit holder denies access to the Board’s authorized agent, then the Board may suspend the permit. Id. The Board may also suspend a permit immediately upon notice if the conditions of the permit have been violated. Id. at § 217(b). The permit holder may apply for reinstatement. Id. If so, there must be a prompt hearing, during which the Board determines whether or not adequate measures have been taken to comply with the conditions of the original permit. Id.

The Arkansas Livestock and Poultry Commission. The Arkansas Livestock and Poultry Commission (the “Commission”) has limited authority to conduct searches. This agency’s authority often overlaps with the authority granted to ADH particularly because of the threat of

communicable diseases that originate in animal populations. The Commission may draft regulations pertaining to the inspection of carcasses of slaughtered animals and sanitary conditions in and about packinghouses slaughtering more than 10,000 head of animals for consumption each year. Ark. Code Ann. § 2-40-103(a)(6). Not only may the authorized agents and employees of the Commission enforce these regulations, but any federal veterinary inspector working in Arkansas that cooperates with the Commission may also do so. *Id.* at § 103(b). If any animal or equipment must be destroyed or disinfected due to exposure to or diagnosis of a disease, the owner should be compensated pursuant to the rules drafted by the Commission. *Id.* at § 103(a)(5).

The Arkansas Emergency Services Act. The Arkansas Emergency Services Act (“AESA”) grants the state government the power to search private property in an emergency situation. Ark. Code Ann. §§ 12-75-101 et seq., *as amended* by 2009 Act 165. Under the AESA the Governor is “responsible for meeting and mitigating, to the maximum extent possible, dangers to the people and property of the state presented or threatened by disasters.” Ark. Code Ann. § 12-75-114(a). Although the AESA doesn’t specifically grant the Governor the power to search private property, it does grant him the power to issue executive orders, proclamations, and regulations that have the effect of law in an effort to mitigate the effect of disasters. *Id.* at § 114(b). The Governor is also granted the authority to “suspend the provisions of any regulatory statutes prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency,” if compliance with them will prevent or delay actions necessary to deal with the emergency situation. *Id.* at § 114(e)(1). These provisions give the Governor the implied authority to create regulations mandating searches of private property if those searches are deemed necessary to mitigating the effects of the disaster.

The Arkansas Department of Emergency Management (“ADEM”) also has authority to conduct searches under AESA. Pursuant to Arkansas Code Annotated § 12-75-111(a), ADEM shall “make surveys of industries, resources, and facilities within the state, both public and private, as are necessary to carry out the purposes of this chapter;” prepare for the issuance of proclamations, regulations, and executive orders by the Governor for the purpose of coping with disasters; cooperate with the Federal Government and any agency to achieve the purposes of this chapter; and doing other things “necessary, incidental, or appropriate for the implementation of this chapter.” Under this provision ADEM does have specific authority to survey property for the purposes of carrying out AESA. ADEM also has implied authority to search under several other provisions of Arkansas Code Annotated § 12-75-111.

B. What Is The Procedure For Issuing A Warrant Or Order To Search Private Property For Public Health Purposes?

Like petitioning the court for an order to isolate or quarantine a patient or area, ADH, or any other appropriate agency, must file a petition with the court. An affidavit by an expert should accompany this petition. For example, if the ADH is seeking to search a facility because of a suspected communicable disease outbreak on the premises, an affidavit from a physician who has diagnosed patients connected to that facility would be appropriate.

SECTION SIX: TAKING PRIVATE PROPERTY FOR PUBLIC HEALTH PURPOSES

No person “shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The government must pay compensation when it takes private property for public use pursuant to its eminent domain power. This constitutional guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole.” *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978) (citing *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)). The government’s exercise of its eminent domain power must substantially advance legitimate state interests to be constitutional. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531 (2005) (citations omitted).

A. **What Constitutes A Taking?**

1. Takings per se

There are two types of government use of private property that entitle the property owner to compensation without a case-specific inquiry. These are known as “takings *per se*.” The first type of taking *per se* is physical invasions. Physical invasions occur when the government physically takes possession of an individual’s private property for public purposes. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002). The second use of private property that is a taking *per se* is when a government’s regulation result in a permanent denial of all economically beneficial or productive use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). That is known as a regulatory taking.

2. Case-Specific Takings

In those cases in which government regulation denies some, but not all, economically beneficial or productive uses of private property, a taking may nonetheless exist if the impact of the regulation on the property is sufficiently severe. *See Penn. Cent. Transp. Co.*, 438 U.S. at 136; *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking”). Government action that is found to be a case-specific taking, rather than a *per se* taking, may be subject to the compensation rule.

3. Factors used to Determine whether or not a Taking has Occurred

Case-specific taking determinations necessitate considerations of the following factors, at the least:

- (a) the economic impact of the regulation on the property owner;
- (b) the extent to which the regulation has interfered with reasonable investment-backed expectations;
- (c) the character of the governmental action; and
- (d) the duration of the regulation.

See Tahoe-Sierra Pres. Council, 535 U.S. at 330-32; *Penn. Cent. Transp. Co.*, 438 U.S. at 136-37.

4. The Federal and State Governments' Right to Seize Property During an Emergency

During a disaster or emergency, the Governor, as state-level Commander-in-Chief of all forces available for emergency duty, may utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency. Ark. Code Ann. § 12-75-114(e)(2). The Governor and the chief executives or governing bodies of the political subdivisions of the state including ADEM are directed to utilize the services, equipment, supplies, and facilities belonging to the state, including state-run or subsidized health care facilities, to the maximum extent practicable. *Id.* at § 121(a). Should these resources prove insufficient, however; the Governor also has the power to commandeer or utilize any private property, including private health care facilities, if he or she finds it necessary. *Id.* at § 114(e)(4). The Federal Government may also acquire private property or goods from citizens in a disaster or emergency situation. 42 U.S.C. § 5196(h)(4)(i)(1).

B. When The Government Must Compensate The Property Owner For A Taking?

State or local governments may, pursuant to this police power, abate or destroy private property as necessary in an emergency to prevent public harm or destruction. Emergency exercises of the government's police powers do not entitle property owners to compensation. *See Lucas*, 505 U.S. at 1029, n. 16; *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (destruction of building to prevent spread of fire does not entitle building owner to compensation).

The government must compensate property owners for *per se* takings pursuant to police power unless the proscribed conduct or use was a restriction inherent in the owner's original title. State or local governments may, pursuant to their police powers, physically invade private property or enact regulations that deprive the property owner of all economically beneficial uses of their property. However, such *per se* takings must be accompanied by compensation for the property owner unless the taking merely enforces a use restriction inherent in the owner's original title. *See Lucas*, 505 U.S. at 1027, 1029 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's state shows that the proscribed use interests were not part of his title to begin with." . . . However, "regulations that prohibit all economically beneficial use of land" are still permissible if they do no more than duplicate the result that could have been achieved under state nuisance law).

As a general rule, the government is not obligated to compensate property owners for other regulations that affect property value for public benefit pursuant to police power. State or local governments may, pursuant to their police power, enact regulations that restrict property use and affect property values for public benefit provided the regulations substantially advance legitimate state interests. Property owners are not entitled to compensation for losses occasioned

by such regulations. *See id.* at 24 (“Land-use regulation does not affect a taking if it substantially advances legitimate state interests”).

The government must compensate harmed property owners for improper exercise of police power. While a government may abate or destroy private property without compensation in order to enforce use restrictions inherent in the owner’s original title, compensation must be paid to property owners whose property was not injurious to the public health yet was harmed or destroyed through an improper exercise of the police power. *See Helena v. Dwyer*, 64 Ark. 424, 42 S.W. 1071, 1071 (1897) (individual rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it relates to, and is convenient and appropriate to promote, the public health. It does not matter that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health) (citations omitted).

AESA provisions dictate how individuals will be compensated when their property is commandeered for use in an emergency. The Governor’s power to commandeer and utilize private property under AESA is subject to the constitutional requirement that the State must make fair compensation for any taking of property. Ark. Const. art. 2, § 22; Ark. Code Ann. § 12-75-114(e)(4). If the Governor commandeers or utilizes facilities pursuant to his emergency or disaster authority, the facility owner may be entitled to compensation from the state. Ark. Code Ann. § 12-75-124(c). Compensation is only allowed in cases where the property owner did not volunteer the property without compensation. *Id.* at § 124(a)(3). To receive

compensation, the facility owner must file a claim with the Arkansas Claims Commission. *Id.* at § 124(d).

In order to receive compensation for property used or commandeered due to a disaster or emergency certain criteria must be met. First, compensation may only be made if the services or the taking of property exceeded the general obligations of private individuals to provide services or property to the public for the purposes of meeting disasters or emergencies. *Id.* at § 124(a)(3). If a claimant volunteered property or services, compensation will not be made. *Id.* In sum, compensation will only be made if the property was commandeered or otherwise used in coping with a disaster emergency.

Every person claiming compensation for lost services or property during a disaster emergency shall file a claim with the Arkansas State Claims Commission. *Id.* at § 124(d). Unless the amount of the damage, loss, or destruction of property is agreed upon by the claimant and the commission, the amount of compensation shall be calculated in the same manner as compensation for the taking of property pursuant to condemnation laws. *Id.* at § 124(e).

In general, Arkansas Code Annotated § 21-9-301(a) provides that all counties, municipal corporations, and other political subdivisions of the state are immune from liability for damages, except to the extent they are covered by liability insurance. No tort action will lie against any such political subdivision because of the acts of its agents and employees. *Id.* § 301(b). This applies to emergency services workers, as well. *Id.* at § 12-75-128(b). Also, the Arkansas Volunteer Immunity Act may provide immunity from liability in certain situations. Ark. Code Ann. §§ 16-6-101 et seq. Those who qualify as “qualified volunteers” under the act will not be held vicariously liable for the negligence of another in connection with or as a

consequence of his or her volunteer activities. *Id.* at § 104(a). The Arkansas Volunteer Immunity Act also provides immunity from tort liability in certain situations for directors of nonprofit corporations. *Op. Ark. Att’y. Gen. No. 93-136 (1993).*

Arkansas Code Annotated § 12-75-125(a) states that “[a]ny person owning or controlling real estate or other premises who voluntarily and with or without compensation grants a license or privilege, or otherwise permits the designation or use of the whole or any part or parts of such real estate or premises for the purpose sheltering persons during an actual, impending, mock, or practice attack shall, together with his successors in interest, if any, not be civilly liable for negligently causing the death of, or injury to, any person on or about such real estate or premises for loss of or damage to the property of such person.” The “Good Samaritan Act” extends immunity from liability to any health care professional “who, in good faith, lends emergency care or assistance without compensation at the place of an emergency or accident” *Ark. Code Ann. § 17-95-101(a).* Any person who is not a health care professional may be immune from liability if they believe another person is in imminent threat of danger and could be helped by their assistance. *Id.* at § 101(b).

C. What Procedure Must Be Followed When The State Or Federal Government Exercises Its Right Of Eminent Domain?

Arkansas Code Annotated §§ 18-15-301 et seq. provides the procedures that a municipal corporation must follow when exercising its power of eminent domain. If a municipal corporation deems it necessary to take private property for a permitted use, it must make an application in writing to the circuit court of the proper county describing the property to be taken, the object proposed, and the name of the owner of the property. *Id.* at § 303(a)(1). The property owner must be served with a notice of the time and place of the application and that

notice must be published for three weeks prior to the application in a newspaper of general circulation in the county. *Id.* at § 303(a)(2).

As soon as the amount of compensation that may be due to the owners of the taken property is ascertained by the jury, the court shall order its payment or deposit in proportion to which each owner is entitled and may require adverse claimants of any part of the money or property to interplead, so as to fully settle and determine their rights and interests according to equity and justice. *Id.* at § 307(a).

The court may direct the time and manner in which possession of the property condemned shall be taken or delivered and may enforce any order giving possession. *Id.* at § 307(b). The assessment costs shall be paid by the corporation, and, as to the other costs which may arise, they shall be charged or taxed as the court may direct. *Id.* at § 307(c). In all cases, as soon as the corporation has paid the compensation assessed, or secured the payment by a deposit of money under the order of the court, possession of the property may be taken and the public work or improvement may progress. *Id.* at § 307(e).

SECTION SEVEN: ABATEMENT OF PUBLIC NUISANCES

The power to declare and abate public nuisances is one of the most powerful tools in the Board of Health's arsenal. When the actions of one individual unreasonably threaten the health or safety of the public, the Board may take steps to stop that activity. The following section outlines the government's power to abate public nuisances to protect the public's health and safety.

A. How Is A Public Nuisance Identified?

Arkansas law recognizes both public and private nuisances. A public nuisance is seen as an unreasonable interference with a right common to the general public. *See Restatement*

(*Second of Torts* § 821B(1) (1979); *Ozark Poultry Prods., Inc. v. Garman*, 251 Ark. 389, 392, 472 S.W.2d 714, 716 (1971)). In the context of public health, public nuisances are those actions or uses of property that significantly interfere with the public's health or safety. Pursuant to their police powers, state and local government entities may require the removal of public nuisances.

A public nuisance may be identified as such by a legislature, government entity, or court. Arkansas statutes explicitly define certain conduct and uses of property as public nuisances. For example, any structure or vehicle in which an alcoholic beverage is sold or possessed in violation of Arkansas law is a public nuisance. Ark. Code Ann. § 16-105-204(a). In other cases, the Arkansas statutes empower government entities, such as public health authorities, to determine when conduct or uses of property amount to a public nuisance. For example, the ADH, a local board of health, or a county health officer may examine a nuisance affecting the life and health of people in a locality. Ark. Code Ann. § 20-7-113(a)(1). By court decision, a city has the power to declare to be public nuisances only those things which constitute a nuisance *per se*. See *Green Star Supermarket, Inc. v. Stacy*, 242 Ark. 54, 59, 411 S.W.2d 871, 873 (1967) (citations omitted). Arkansas law recognizes that a public nuisance may be a nuisance *per se* or nuisance *per accidens*. A nuisance *per se*, or a nuisance at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Eddy v. Thornton*, 205 Ark. 843, 846, 170 S.W.2d 995, 996 (1943) (citations omitted). On the other hand, there are instrumentalities, which in their nature are not nuisances, and whether or not they are nuisances depends upon their surroundings, the manner in which they are conducted or managed, or other circumstances. *Thiel v. Cernin*, 224 Ark. 854, 856-57, 277 S.W.2d 677, 678 (1955) (citations omitted). Such instrumentalities, when they constitute nuisances, are termed nuisances *per accidens*. *Id.* at 857, 277 S.W.2d at 678.

The governor may require the Board of Health to examine nuisances or questions affecting the security of life and health in any locality in the state. Ark. Code Ann. § 20-7-113(a)(1). In such cases, the Board is granted all the necessary powers to make those investigations. *Id.* If the Governor approves, the report or examination shall be filed in the Office of the Secretary of State. *Id.* at 113(b). The Governor may then declare those things found and certified by the board to be a nuisance to be public nuisances and order them to be changed as directed, abated, or removed. *Id.*

B. Jurisdiction And Proceedings To Enjoin A Public Nuisance

Arkansas Code Annotated § 16-105-301 et seq. declares that operating a dance hall around which liquor is sold is a public nuisance and outlines the procedures that courts typically follow to abate such a nuisance. This process can be extrapolated to other proceedings. The circuit courts of this state have jurisdiction to abate the public nuisance defined in Arkansas Code Annotated § 16-105-303.

Jurisdiction is conferred upon petition in the name of the State of Arkansas, on relation of the Attorney General or any prosecuting attorney of the state, or without the concurrence of the officers upon the relation of ten (10) or more qualified electors and freeholders of the county living within a radius of two (2) miles wherein the nuisance may exist.

Ark. Code Ann. § 16-105-304(a). Upon petition addressed to the prosecuting attorney, of ten (10) qualified electors, it shall become mandatory duty of the prosecuting attorney for the county and district wherein the nuisance may exist to institute an action in the circuit court to abate the public nuisance. *Id.* at § 308(b). Nuisance law is an equitable doctrine, so the individuals seeking to abate or enjoin a nuisance must do so with clean hands. *Albright v. Karston*, 206 Ark. 307, 317-18, 176 S.W.2d 421, 423 (1943) (citations omitted).

C. Remedies When A Public Nuisance Is Found

1. Court Remedies

If the existence of the nuisance is established in the action, an order of abatement shall be entered as a part of the judgment or decree of the court and shall direct the removal all fixtures and other movable property used in conducting, maintaining, aiding or abetting the nuisance and shall direct their sale in the manner provided for the sale of chattels under execution. Ark. Code Ann. § 16-105-412(a). “The order shall provide for any appropriate equitable relief determined by the court to be necessary to abate said nuisance and may further provide, if determined to be the least restrictive alternative available to effectively accomplish said abatement, for the effectual closing of the building or place for such period of time as is determined to be necessary by the court as adequate to abate said nuisance.” Id. at § 412(b). An alternative to closure may be considered. Id.

If the court finds that any vacancy resulting from closure of the building or place may create a nuisance or is harmful to the community, the court may order the person responsible for the existence of the nuisance to pay damages in an amount equal to the fair market rental value of the building or place for such period of time as determined appropriate. Id. at § 412(c)(1).

The court may assess a civil penalty not to exceed five thousand dollars (\$5,000) against any or all of the defendants, based upon the severity of the nuisance and its duration. Id. at § 412(d).

2. Legislative and Executive Remedies

A state or municipal legislature may, through an act or ordinance, authorize summary abatement of a defined nuisance by a government entity or agent provided the property to be abated is of little value and the use of the property for illegal purposes is clear. *See Ross v.*

Desha Levee Board, 83 Ark. 176, 103 S.W. 380, 381 (1907) (court held this included “the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, infected clothing, obscene books or pictures, or instruments which can be only used for illegal purposes”).

The Governor may order that a nuisance found upon examination by the Board be changed, abated or removed. Ark. Code Ann. § 20-7-113(b). If this order is violated, it will be punished as a misdemeanor. Id. at § 113(c).

3. Arkansas Department of Health or Local Board of Health Remedies

Under certain situations, the ADH, a local board of health, or a health officer may order the abatement of conditions constituting a public nuisance. See Ark. Code Ann. § 16-105-308.

The Governor may require the Board to examine and remove, if necessary, nuisances affecting the public’s health. Id. at § 20-7-113. The Board of Health shall have all necessary power to make those examinations and certify public nuisances and order abatements or removal. Id.

4. Criminal Nuisance Abatement Board’s Remedies

“If the Criminal Nuisance Abatement Board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of the place or premises to adopt such procedure as may be appropriate under the circumstances to abate the nuisance.” Ark. Code Ann. § 14-54-1705(a). The order includes, but is not limited to, the following:

- (i) prohibiting the maintenance of the nuisance;
- (ii) prohibiting the operation or maintenance of the place or premises, including the closure of the place or premises or any part of the premises for a period of no longer than the effective date of the order;
- (iii) prohibiting the conduct, operation, or maintenance of any business or activity on the premises which is conducive to the nuisance;

- (iv) ordering the eviction of tenants of the place or premises who are responsible for the criminal conduct or who allow or permit another to commit the criminal conduct;
- (v) ordering the owner of the place or premises or the owner's agents to perform criminal background checks of tenants before renting the property; or
- (vi) ordering the owner to bring the place or premises into compliance with state and local safety codes before allowing the reoccupation of the property.

Id. at § 1705(b). The order must state that violations of this order may be punishable by a fine of up to two hundred fifty dollars (\$250) for each day that violations of the order continue or that the public nuisance continues. Id. at § 1705(c). An order entered shall become effective seven calendar days after the order has been posted on the subject premises and mailed to the owner's last known address and shall expire one year after the effective date or at such earlier time as is stated in the order. Id. at § 1706. Within thirty (30) days after an order or decision has been entered, any party may appeal to a circuit court for a de novo review on the record and if an appeal is filed, the decision or order of the board shall remain in effect unless stayed by the circuit court. Id. at § 1707(a). The order may be stayed pending appeal to the circuit court pursuant to Arkansas Code Annotated § 14-54-1707(b).

SECTION EIGHT: HABEAS CORPUS

A. In A Public Health Context, When May An Individual Petition For A Writ Of Habeas Corpus?

In the absence of prescribed procedures to attack a quarantine or isolation order, an individual will have to rely on a petition for a writ of *habeas corpus* to challenge the state's actions. The writ of *habeas corpus* is a writ employed to bring an individual before a court for a hearing to determine whether his or her detention or imprisonment is legal. In the public health context, such detention or imprisonment would most likely occur when an individual suspected

of being contaminated by a bio-hazard or a communicable disease is being quarantined or isolated by ADH or others against his or her will.

B. Issues Of Jurisdiction And Venue

Arkansas Code Annotated § 16-112-102(a)(1) provides, “the writ of *habeas corpus* shall be issued upon proper application by a Justice of the Supreme Court or a judge of the circuit court. The power of the Supreme Court and circuit court to issue writs of *habeas corpus* shall be coextensive with the state.” In the absence of the circuit judge, the county judge has authority to issue a writ in his respective county. *Id.* at § 102(a)(2)(A). The law requires the judge issue the writ upon a properly submitted petition. *Id.* at § 103(a)(1). Judges who fail to issue the writs must pay the petitioner \$500.00. *Id.* at § 102(b).

C. What Information Must Be Contained In A Petition For A Writ Of *Habeas Corpus*?

The writ must specify the time and place to which it shall be returned. Ark. Code Ann. § 16-112-105(b)(2). It must be directed to the person who has custody of the “prisoner.” *Id.* at § 105(b)(1). In the writ, the custodian may be designated either by name of office, if he has any, or his own name. *Id.* at § 105(c)(1). If both names are uncertain or unknown, the custodian may be described by any assumed designation. *Id.* The person being held may be designated by name or, if the name is uncertain or unknown, the person may be described in any other way so as to designate or identify the person intended. *Id.* at § 105(c)(2). The person petitioning for the writ must show, by affidavit or other evidence, probable cause to believe the individual is being detained unlawfully. *Id.* at § 103(a)(1). The writ of *habeas corpus* shall not be disobeyed for any defect of form. *Id.* at § 105(d). For an example of a petition for writ of *habeas corpus* see Part Three: Petitions, Checklists and Model Orders, D, Model Petition for Writ of *Habeas Corpus*.

D. What Is The Procedure For Bringing A Writ Of *Habeas Corpus* In A Public Health Case?

The writ shall be issued upon an application “showing, by affidavit or other evidence, probable cause to believe the individual is detained without lawful authority.” Ark. Code Ann. §16-112-103(a)(1). The writ of *habeas corpus* may be granted without the seal of the officer but must be signed him or her. Id. at § 105(a). The writ shall be directed to the custodian where the person is alleged to be unlawfully held, and made returnable as soon as possible to the issuing authority. Id. at § 105(b)(1). The writ shall be made returnable within three days after it is served. Id. at § 108(a). However, if the person is to be brought more than twenty miles, it shall be made returnable within so many more days as will be equal to one day for every twenty miles of the further distance. Id. The return must be signed by the person making it, and except when the person is a sworn officer and makes the return in his or her official capacity, it shall be verified by oath. Id. § 108(c)(3).

The writ must be served by any qualified officer or by a person designated by the issuing judge. Id. at § 106(a). A person evading service of a writ of *habeas corpus* is guilty of a Class A Misdemeanor and must pay the detained person \$500.00. Id. at § 106(c).

The law requires that the custodian physically bring the person alleging to be unlawfully held to the court. Id. at § 110. In the case of a person believed to be contaminated by a bio-toxin, this requirement would most likely create a difficult and potentially dangerous situation.

Thus, Arkansas Code Annotated § 16-112-112(a) provides:

Whenever, from sickness or other infirmity of the person directed to be produced by a writ of *habeas corpus*, the person cannot, without danger, be brought before the court or judge before whom the writ is returnable, the person in whose custody he is may state the fact in his return, verifying the fact by his oath. The court or judge, if satisfied of the truth of the allegations, and the return is otherwise sufficient, shall proceed

thereon to dispose of the matter in the same manner, as if the prisoner were brought before him.

E. What Remedies Are Available To The Court?

After hearing the evidence, the judge has the power to resolve the matter, including the power to dismiss the petition or release the individual from custody. Ark. Code Ann. § 16-112-115. The judge must adjudge the costs of the proceeding, including the charge for transporting the prisoner, to be paid as he or she deems right. Id. The payment may be enforced by attachment, or otherwise, by the court. Id.

F. What Enforcement Mechanisms Are Available To The Court?

Ark. Code Ann. § 16-112-114(a) sets out the power of the court to compel witnesses to appear at a hearing on the matter and its power to punish those witnesses for contempt. The court may hear evidence through affidavit if the witness is unable to appear. Id. at § 114(b). After hearing the evidence, the judge has the power to resolve the matter, including the power to dismiss the petition or release the person from custody. Ark. Code Ann. § 16-112-115.

If the court believes with good reason that the habeas corpus applicant will be carried out of the court's jurisdiction or will suffer some irreparable injury before compliance with the writ can be enforced, then the court may issue a warrant ordering the sheriff or constable to bring the applicant before the court immediately. Ark. Code Ann. § 16-112-123(a)(1).

PART TWO: LEGAL ISSUES IN A PUBLIC HEALTH EMERGENCY CONTEXT

SECTION ONE: ARKANSAS PUBLIC HEALTH INFRASTRUCTURE

A. Arkansas Department Of Health

Pursuant to Arkansas Code Annotated § 25-2-107, the Arkansas State Board of Health (“Board”) has the authority to transfer all or part of its duties to the Arkansas Department of Health (ADH). This is known as a “Type IV transfer.” *Id.* Under this statute, the Board is required to obtain the Governor’s signature on any rules and regulations it passes. *Id.* at § 107(a)(1).

ADH was created by Act 38 of 1971 as a cabinet level agency. It provides core public health functions for the state, including: policy development, assessment, and assurance. ADH is also responsible for delivering a broad range of public health preventive and regulatory services statewide. There are five centers, or organizational units, within ADH: the Center for Health Advancement, the Center for Health Protection, the Center for Local Public Health, the Center for Public Health Practice, and the Public Health Laboratory. The mission of the Arkansas Department of Health is to protect and improve the health and well-being of all Arkansans.

In 2005, the legislature voted to merge ADH with the Department of Human Services. 2005 Act 1954. The new Department of Health and Human Services (DHHS) was separated again in 2007 by Act 384. On May 2, 2007, the Governor executed the final separation order, Executive Order 07-05.

The executive head of the ADH is the Director. Ark. Code Ann. § 25-9-101(a)(2)(B)(i). The Director serves at the pleasure of the Governor and is responsible for appointing the heads of the divisions with the advice and consent of the Governor. *Id.* at § 101(a)(2)(B)(ii). All other

personnel shall be employed by and serve at the pleasure of the director and the director shall control and supervise each division. Id. at § 101(b)-(c). The Director may delegate his or her powers and duties to divisions within the Department as he or she sees necessary for the effective and efficient operation of the Department. Id. at § 101(c)(2).

1. Arkansas State Board of Health

The State Board of Health was created in 1913 by Act 96 and serves as a policy advisory body to ADH. The Board also has specific statutory authority in issues related to public health. For example, although the Governor is responsible for appointing a Surgeon General for the State of Arkansas, the board must approve of his or her appointment. Ark. Code Ann. § 20-7-103(b)(1).

Membership. The Governor appoints the members of the Board. Id. at § 102(a). The Board is specifically comprised of:

- a. Seven licensed medical doctors in good professional standing, 1 from each of the 4 congressional districts and 3 from the state at large (1 must be an osteopathic physician);
- b. One regularly licensed, registered, practicing dentist with at least 7 years experience;
- c. One registered professional engineer with at least 7 years experience;
- d. One regularly licensed professional nurse who has been a resident of Arkansas for at least 7 years, has acquired at least a bachelor's degree, and has at least 5 years of nursing experience;
- e. One regularly licensed pharmacist with at least 7 years experience;
- f. One regularly licensed veterinarian with at least 7 years of practice;
- g. One registered sanitarian with at least 7 years experience;
- h. One hospital administrator with at least 7 years experience;

- i. One regularly licensed, registered and practicing optometrist with at least 7 years experience;
- j. One regularly licensed and practicing chiropractor;
- k. One restaurant operator who has owned or operated a restaurant for at least 5 years;
- l. One consumer representative with an interest in public health;
- m. One member over the age of 60 who represents the elderly and is not actively engaged in or retired from any occupation, profession, or industry that is regulated by the board;
- n. One podiatrist with at least 7 years experience;
- o. One member of the Arkansas Public Health Association;
- p. One licensed medical doctor from a rural county that has a medically underserved population; and
- q. the Director of ADH.

Id. at § 102(a).

Officers. The members of the Board will elect their own president, but cannot elect the Director of ADH. Ark. Code Ann. § 20-7-103(a). The Director of ADH shall serve as the Board's secretary. Id. at § 25-9-101(a)(2)(B)(iii).

Compensation. Each appointed member may receive, in accordance with Arkansas Code Annotated § 25-16-901, expense reimbursements and stipends. Ark. Code Ann. § 20-7-104.

Conducting business.

Frequency of meetings. The Board must meet at least one time every three months and by request of the President or a majority of the board, must meet at other times as necessary for the public health. Ark. Code Ann. § 20-7-105(a).

Quorum. A majority of the Board constitutes a quorum for the transaction of business and performance of duties. Ark. Code Ann. § 20-7-105(c).

General powers. The Board possesses the power to make all necessary and reasonable rules and regulations of a general nature for the protection of the public health and safety. Ark. Code Ann. § 20-7-109(a)(1). These rules and regulations are subject to the review of the House and Senate Interim Committees on Public Health, Welfare, and Labor or the appropriate subcommittees thereof. Id. at 109(a)(2). Any rules and regulations must be signed by the Governor. Id. at § 25-2-107(a)(1).

Specific powers.

Health. The Board shall have general supervision and control of all matters related to the health of the citizens of Arkansas. Ark. Code Ann. § 20-7-110(a)(1). These powers have been described in greater detail throughout this Bench Book. Therefore, the following section provides only a summary of the Board's powers.

Disease: quarantines. The Board shall have direction and control of all matters of quarantine regulations and enforcement and the authority to prevent the entrance of such diseases from outside the state. Id. at § 110(a)(2).

Disease: epidemics. When the Governor determines the state is threatened by an epidemic or contagious disease within the state or any adjoining state and determines that public safety requires the Board takes action, he or she will bring the relevant facts to the Board's attention so it can take all actions to prevent the spread of the epidemic or contagious disease. Id. at § 110(b).

Sanitary measures. The Board has direction and control over all sanitary and quarantine measures to control all infectious, contagious, and communicable diseases within the state and to additionally suppress them and prevent their spread. Id. at § 110(a)(3).

Inspection of public structures. At any time, the Board may enter, examine, and survey all grounds, vehicles, structures, apartments, buildings, and plans to promote or preserve the public health. Id. at § 112(b).

Examination of nuisances. The Governor may require the Board to examine and remove, if necessary, nuisances affecting the public's health. Id. at § 113(a)(1). The Board shall have all necessary power to make those examinations and certify public nuisances and order abatements or removal. Id.

Water pollution. ADH administers the "Public Water System Supervision Program", which includes the monitoring and supervision of all community public water systems. Id. at § 20-28-102(5).

2. Public Health Laboratory.

Authority. The Public Health Laboratory shall be established and maintained at ADH under direct supervision of the Director or his authorized representatives. Ark. Code Ann. § 20-7-114(a)(2).

Purpose. ADH shall establish, equip, and maintain the public health laboratory for the following purposes:

- a. analyzing food and drugs to enforce pure food and drug laws;
- b. analyzing the environment to investigate cases or suspected cases of human exposure;
- c. investigating cases and suspected cases of malaria, diphtheria, typhoid fever, tuberculosis, epidemic cerebro-spinal meningitis, glanders, hookworm disease, rabies, and other infections, contagious, communicable, and debilitating diseases.

Id. at § 114(a)(1).

B. Local Health Departments

There are 94 local health units in the state of Arkansas. These local units are established and maintained through joint efforts of the state, county, and local governments. In addition to all its other powers and duties, ADH has authority to exercise the powers of local health authorities within their territorial jurisdiction, including but not limited to the enforcement of state orders and rules, when the ADH believes:

- i. a public health emergency exists; or
- ii. a local health authority fails or refuses to enforce laws and rules necessary to prevent and control the spread of a dangerous communicable or infectious disease.

Ark. Code Ann. §§ 20-7-101, 109, 110, & 113. The laws surrounding the establishment and authority of a local health department depend mainly on the size of the local government entity.

1. Cities.

City Board of Health (1st or 2nd class cities). The city council of a city of the first or second class has the power to establish a city board of health. A city board of health shall be comprised of no fewer than five persons; two of whom must be physicians that graduated from a reputable medical college and who are in good professional standing. The mayor shall appoint the members. The mayor of the city shall be an *ex officio* member of the board. The board shall have jurisdiction for one mile beyond the city limits, and for quarantine purposes, in cases of epidemic, five miles. Ark. Code Ann. § 14-262-102.

City Health Officer (1st or 2nd class cities). The governing body of a city of the first or second class as well as an incorporated town may create a City Health Officer. The mayor has the authority to appoint the City Health Officer subject to the approval of the city council. The City Health Officer must be a physician who is qualified to practice medicine in Arkansas.

Current local ordinances and the direction of the city council or board determine the duties of the city health officer. Typical duties are assisting with quarantine issues, disease prevention, sanitation, and vital and mortuary statistics. Ark. Code Ann. § 14-262-103.

City Health Department. Cities with populations of twenty-five 25,000 or more persons may establish a City Health Department by an order of the city council. A city board of health shall be comprised of no fewer than five persons; two of whom must be physicians that graduated from a medical school approved by the Council on Medical Education and Hospitals, or its successor, of the American Medical Association. The mayor shall appoint the board members for five-year terms. Ark. Code Ann. § 14-262-116.

City Health Officer (cities with a population of at least 25,000). Cities with populations of 25,000 or more which establish a City Health Department, shall also establish a City Health Officer. The mayor has the authority to appoint the City Health Officer subject to the approval of the city council for a four year term. The City Health Officer must be a physician. The duties of the City Health Officer are determined by city council, the city board of health, and any local rules or ordinances, as well as the duties imposed by statute. Ark. Code Ann. § 14-262-116.

2. Counties and Districts

County Health Officer. The State Board of Health shall appoint a County Health Officer for each county, subject to the county judge's approval. Ark. Code Ann. § 14-262-104(b).^{*} The County Health Officer shall be a graduate of a reputable medical school and have three years practice experience in Arkansas. Id. at § 104(c).^{*} The County Health Officer is responsible for the care of county prisoners, county hospital patients, and other duties required of a county

^{*} 2009 HB 1354 is currently before the senate. If passed this bill will change § 104(b) so that the Board appoints the County Health Officer *upon recommendation* of the county judge.

^{*} If HB 1354 passes, the Health Officer must be eligible to practice in Arkansas. He can also be a graduate of a school of osteopathy.

physician. Id. at § 104(d)(1).^{*} The County Health Officer shall also assist the Board with county quarantine, vital and mortuary statistics, and sanitation concerns. The County Health Officer serves a two year term. Id. at § 104(b).^{*}

County Health Departments. County Health Departments are created through a vote during a general election. Id. at § 106(d). The county must have received a petition from 15% of its qualified electors to have the issue placed on the general election’s ballot. Id. at § 106(d)(1). If passed, the county court shall establish a County Health Department. Id. at § 106(d)(2).

Multiple County Health Departments. A Multiple County Health Department is created through a vote during a general election. Id. at § 106(e). Two or more adjacent counties must have received a petition from 15% of each of their qualified electors to have the issue placed on the general election’s ballot. Id. at § 106(e)(1). If passed by a majority in each county, the county courts shall establish a Multiple County Health Department. Id. at § 106(e)(2).

District Health Department. Subject to the approval of the Board and their county courts, any two or more counties may establish a District Health Department. Id. at § 106(b).

Jurisdiction of County or District Health Departments. County and District Health Departments shall have jurisdiction over all unincorporated areas and all municipal corporations within the county’s territory. Id. at § 107(a). Municipal corporations within the territory which at the time of the establishment of the County or District Health Department having a population in excess of 25,000 and their own health department and health officer are excluded absent a municipal corporation’s vote to merge with the county or district health department. Id.

Public Health Officer. The Public Health Officer is the head of each county or district health department. Id. at § 108(a). The county or district board of health shall appoint a Public

^{*} Under HB 1354, the Health Officer “shall serve as a key public health representative in the local community.” His specified duties will be different under the new statute.

^{*} Under HB 1354, the Health Officer will serve a four year term.

Health Officer. Id. at § 108(b)(1). The State Board shall set the qualifications for the position of Public Health Officer. Id. The term of the Public Health Officer is four years. Id. The Public Health Officer shall appoint all other county or district health department personnel. Id. at § 108(c)(1). The Public Health Officer has the following powers and duties:

- (a) to administer and enforce Arkansas' public health laws; the State Board of Health's rules and regulations; and the county or district court's rules and regulations;
- (b) to exercise all powers and duties conferred and imposed upon county or district health departments not expressly delegated to county or district boards of health;
- (c) to act as the local registrar of vital statistics for the area over which the county or district health department has jurisdiction;
- (d) to be custodian of all property and records of the department; and
- (e) to submit an annual report to the State Board of Health.

Id. at § 112.

County and district health departments' powers and duties. Each county and district health department shall have the following powers and duties:

- i. to administer and enforce the laws pertaining to public health and the State Board of Health's rules and regulations;
- ii. to investigate and control epidemics and communicable diseases;
- iii. to establish, maintain, and enforce isolation and quarantine and exercise such control over property and other persons within their jurisdiction to protect the public health;
- iv. to investigate sanitary and health concerns affecting public health within their jurisdiction;
- v. to cooperate with ADH and the State Board in any matter pertaining to the public's health; and
- vi. to organize legal health programs for the protection of the public health.

Id. at § 109(a).

County and district health boards. Every county court with a district health department shall establish a county or district Board of Health. Id. at § 113(a). The Members are appointed by the county court(s). Id. The board members shall serve five year staggered terms. Id. at § 113(b)(1). The boards shall have the following powers and duties:

- (a) to provide suitable facilities for the county or district health department;
- (b) to determine general policies for the public health officer to administer;
- (d) to act as advisor to the Public Health Officer; and
- (c) to adopt necessary rules and regulations for to protect the public health.

Id. at § 115(a).

The county and district boards shall be composed as follows:

County board members. There shall be at least five members, at least one shall be a physician who has graduated from a medical school approved by the Council on Medical Education and Hospitals, or its successor, of the American Medical Association. Id. at § 113(b)(1).

District board members. There shall be at least five members. Every county shall have at least two board members, one of whom shall be a physician who has graduated from a medical school approved by the Council on Medical Education and Hospitals, or its successor, of the American Medical Association. Id. at § 113(c)(1).

SECTION TWO: JURISDICTION OVER PUBLIC HEALTH LEGAL ISSUES

In examining the jurisdiction of various government entities over matters of public health, it is necessary to understand the underpinnings of the legal authority of these entities. This section provides a basic overview of the bases for the exercise of jurisdiction by various components of the American and Arkansas legal systems over matters of public health.

A. Federal Constitutional Basis

1. The United States Constitution and Public Health

We the people of the United States, in Order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

U.S. Const. pmbl. The Preamble's stated purpose of promoting the "general welfare" is the closest the federal constitution comes to directly addressing public health. This silence concerning the matter of public health, together with the Tenth Amendment's reservation of undelegated powers to the states, indicates that the federal government's public health powers extend only to the boundaries permitted by its defense, interstate commerce, and tax powers. *See, e.g., Carolene Prods. Co. v. Evaporated Milk Assn.*, 93 F.2d 202, 204 (7th Cir. 1937) ("While the police power is ordinarily said to be reserved by the states, it is obvious that it extends fully likewise to the federal government in so far as that government acts within its constitutional jurisdiction Its 'dimensions are identical with the dimensions of the government's duty to protect and promote the public welfare.'") (citations omitted). In addition, the federal government is responsible for protecting the public health in discrete geographic areas directly under its control.

2. Federalism: Allocation of Power between the Federal Government and the States

A number of constitutional provisions govern the division of authority between federal and state governments. These provisions provide parameters for the authority of federal and state governments with respect to matters of public health.

Congress does not have plenary, or absolute, authority; it must draw its authority from specific, enumerated powers set forth in the Constitution. U.S. Const. art. I, § 8. Under the Tenth Amendment, states retain all powers not specifically delegated to the federal government. U.S. Const. amend. X. For example, the federal government cannot “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. U.S.*, 505 U.S. 144, 176 (1992) (citations omitted); *see also Printz v. U.S.*, 521 U.S. 898, 925 (1997).

Under Article VI of the Constitution, federal law is the supreme law of the land. If a federal and a state law are in conflict, the federal law controls. *See, e.g., Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our preemption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”) (citations omitted).

Because the Constitution explicitly delegates commerce powers to Congress, states are, by implication, prohibited from burdening or interfering with interstate commerce. U.S. Const. art. I, § 8; *see, e.g., Granholm v. Heald*, 544 U.S. 460, 472 (2005) (striking down state statutes that prohibited out-of-state wineries to ship directly to consumers but permitted in-state wineries to do so) (citations omitted).

The Eleventh Amendment of the Constitution limits the ability of Congress to authorize private lawsuits against individual states: “The Judicial power of the United States shall not be

construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. Const. amend. XI; Ark. Const. art. 5, § 20 (“The State of Arkansas shall never be made a defendant in any of her courts”). This “sovereign immunity” has implications for public health issues. *See, e.g., Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005-06 (8th Cir. 1999), *cert. granted in part by Alsbrook v. Arkansas*, 528 U.S. 1146 (2000). There are two exceptions to this rule: (1) States may voluntarily waive their sovereign immunity, or (2) Congress may abrogate a state’s sovereign immunity under certain limited circumstances. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 61-62, 65 (1996). There is also an equitable exception to sovereign immunity. *See Ark. Tech. University v. Link*, 341 Ark. 495, 503 (2000)(“equity has jurisdiction to enjoin or restrain State officials or agencies from acts which are *ultra vires*, in bad faith, or arbitrary and capricious) (citations omitted).

Officers and employees of the State of Arkansas have immunity under Arkansas Code Annotated § 19-10-305(a), *as amended* by § 1 of 2009 Act 284. This immunity protects them from liability and suit, except to the extent that they are covered by liability insurance for damages caused by acts and omissions other than malicious ones occurring within the course and scope of their employment. *Id.* Under this chapter, an agreement between the state of Arkansas and the United States or the District of Columbia under the Interlocal Cooperation Act, confers the status of employee on persons acting pursuant to that agreement. *Id.* at § 305(b), *as amended* by § 1 of 2009 Act 284.

By and large, state and local governments bear primary responsibility for population-based health services. Gostin, *supra*, at 47. Two commonly-recognized concepts—police power and

parens patriae—serve as sources of state authority to protect the common good and the public’s health. State law sets the parameters for this authority.

The police power. A state’s police power is “the inherent authority of the state (and, through delegation, local governments) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people.” Gostin, *supra*, at 48. These powers restrict, within federal and state constitutional limits, private interests, personal interests in autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property. *Id.*; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (“Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, matters of local concern, the States traditionally have had great latitude under the police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (citations omitted).

The parens patriae power. The State has a legitimate interest under its *parens patriae* power to provide care to its citizens and serve as guardian of persons under legal disability. See, e.g., *In re Estate of Longeway*, 549 N.E.2d 292, 301, 133 Ill.2d 33, 52 (1989).

3. Separation of Powers

In addition to distinguishing between the powers of the federal government and the States, the United States Constitution divides the powers of the federal government among three different branches. Under the Constitution, the legislative branch has the power to make laws and allocate resources; the executive branch, through administrative agencies, has power to implement and enforce the laws created; and the judicial branch interprets and applies the specific laws to individual disputes, in turn establishing limits on the government’s power. The

Arkansas Constitution also divides the state government into three branches which parallel those of the federal government. Ark. Const. of 1874, Art. IV, § 1.

Legislative branch. The legislative branch exercises its authority in matters of public health through three primary avenues—regulation of commerce, taxes, and spending.

Regulation of commerce. Under Article I, § 8 of the Constitution, Congress is given the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

Congress’s authority to exercise its commerce clause authority is limited to activities that substantially affect interstate commerce. *See, e.g., U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995) (striking down a law making it a federal offense for any individual to knowingly possess a firearm in a school zone because possession of a gun in a local school zone is not economic activity that substantially affects interstate commerce); *U.S. v. Morrison*, 529 U.S. 598, 610 (2000) (striking down the civil remedy provisions of the Violence Against Women Act because gender-motivated crimes of violence are not activities that substantially affect interstate commerce).

The Commerce Clause also grants Congress the power to regulate “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citations omitted) (federal regulation of marijuana grown for medical use did not violate the commerce clause).

Tax and spending power. Article I, § 8 of the United States Constitution also affords Congress the authority to “lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States.”

Congress has the authority to use its power to raise taxes on a number of fronts when it comes to matters of public health. In addition to raising revenue for government entitlement programs such as Medicare and Medicaid, Congress can use its taxing power to penalize certain behaviors and reward others. For example, Congress can offer tax incentives to employers that offer employer-sponsored health plans or it can place excise taxes on tobacco products. Gostin, *supra*, at 36-37.

Through its spending power, Congress has the ability to authorize expenditures for public health purposes and to induce states to comply with federally-imposed conditions. Congress may attach conditions upon states' receipt of federal funds in pursuit of the general welfare, as long as it does so unambiguously. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

Executive branch. Under Article II of the United States Constitution, the executive branch is imbued with the authority to execute and enforce those laws enacted by Congress. *See also* Ark. Const. Art. 6, § 2 (the “supreme executive power of this state” is vested in the Governor). However, as regulatory schemes—particularly those related to public health matters—have become more complex, the executive branch, through its various administrative agencies, has taken on quasi-legislative and quasi-judicial functions as well. These functions are frequently delegated to agencies of the executive branch because of the complex nature of the issues considered. *See, e.g., Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 589 (1985) (holding Congress may create a private right so closely tied to a public regulatory scheme that it is appropriate for agency resolution). The federal agency charged with the primary responsibility for public health is the United States Department of Health and Human Services (USDHHS). The Administrative Procedures Act, originally enacted by Congress in 1946, sets forth the framework that federal administrative agencies, such as USDHHS, are required to

follow for the promulgation of rules, administrative adjudications, and enforcement of regulations. *See* 5 U.S.C. § 550 *et seq.** Individual states, including Arkansas, have similar processes in place that apply to state administrative agencies. *See* Ark. Code Ann. § 25-15-101 *et seq.* (the Arkansas Administrative Procedures Act).

Rulemaking authority. In order to enact, or promulgate, valid regulations, an administrative agency must first receive a grant of authority from Congress. For example, Congress has passed a law that protects the privacy of patient health information. Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 201 *et seq.** Congress assigned the task of fleshing out the specific physical and technical safeguards to USDHHS. *Id.* That agency must provide the public with notice of any proposed rulemakings and an opportunity to participate in the rulemaking process through written submissions or participation in a public hearing. *See* 5 U.S.C. § 553(b) & (c); Ark. Code Ann. § 25-15-204(a).

Enforcement authority. Once implementing regulations are in place, an administrative agency has the authority to enforce such regulations through sanctions. 5 U.S.C. § 558; Ark. Code Ann. § 25-15-217. An agency may only do so within the delegated jurisdiction and as authorized by law. *Id.*

Quasi-judicial authority. Administrative agencies are required to provide individuals who are affected by the agency rules or enforcement actions notice of the basis for the agency's rule or enforcement action and an opportunity, through a process called adjudication, to present evidence in support of the individual's position. 5 U.S.C. § 554; Ark. Code Ann. § 25-15-208. Typically, this process is utilized by persons who are directly affected by agency action as holders of a license or permit issued by the agency. In addition to providing

* There is currently legislation pending in the U.S. Congress that may change the Administrative Procedures Act. *See* 2009 Cong. U.S. H.R. 1107.

* HIPAA was updated by PL 111-5 (Feb. 17, 2009).

for adjudications, the Administrative Procedures Act also offers persons adversely affected by an agency rule or adjudication the opportunity to seek judicial review of the agency's action. 5 U.S.C. § 702; Ark. Code Ann. § 25-15-212. Such review is typically only afforded after the aggrieved party has exhausted his or her remedies at the administrative level. *See, e.g., Sims v. Apfel*, 530 U.S. 103, 107 (2000) (citations omitted).

Judicial branch. Article III of the United States Constitution addresses those powers vested in the United States Supreme Court and “such inferior Courts as the Congress from time to time ordain and establish”; in short, the Constitution only addresses the powers of federal courts. The Arkansas Constitution addresses the power of Arkansas courts. Ark. Const. Amend. 80.

Concept of judicial review. The Supreme Court has the inherent authority to declare acts of Congress unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 (1 Cranch 137) (1803) (“it is emphatically the province and the duty of the judicial department to say what the law is”).

Relationship to state courts. It is generally assumed that state courts have concurrent jurisdiction over federal matters, unless a state court is expressly prohibited from hearing the matter. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (citations omitted). The presumption of state-court jurisdiction over federal causes of action can be rebutted only “by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” *Id.* (citations omitted).

Federal court jurisdiction. Federal courts are widely regarded as courts of limited jurisdiction. The parameters of federal jurisdiction are defined by Article III of the Constitution

and interpreting case law. Federal district courts most often have original jurisdiction, while the Circuit Courts of Appeals and the United States Supreme Court have appellate jurisdiction. Various federal rules and statutes outline the scope of federal court jurisdiction.

(1) Jurisdiction over parties. Federal courts are authorized by Federal Rule of Civil Procedure 4(k) to exercise personal jurisdiction over a defendant when the forum state is permitted to do so.

(2) Diversity jurisdiction. Under 28 U.S.C. § 1332, federal district courts have original jurisdiction over civil actions where the amount in controversy, exclusive of interest and costs, exceeds \$75,000 and is between (a) citizens of different states; (b) citizens of a state and citizens of a foreign state; (c) citizens of different states in which citizens of different states are additional parties; and (d) a foreign state as plaintiff and citizens of a state or different states.

(3) Federal question jurisdiction. Under 28 U.S.C. § 1331, a federal district court has original jurisdiction of “all civil actions arising under the Constitution, laws, or treaties of the United States.”

(4) Supplemental jurisdiction. In any civil action where a district court has original jurisdiction, that court shall have supplemental jurisdiction over all other claims that are so closely related to claims within the court’s original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. § 1367.

B. Arkansas Law And Public Health Jurisdiction

In light of the United States Constitution’s delegation of non-enumerated powers to the states under the Tenth Amendment, states indeed bear the primary responsibility for ensuring the health of their citizens. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (“The safety and health of the people of Massachusetts are, in the first instance, for that commonwealth

to guard and protect.”); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health, Louisiana*, 186 U.S. 380, 387 (1902) (“That from an early day the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question.”).

1. The Arkansas Constitution

Source of authority. Under the Arkansas Constitution, “[a]ll political power is inherent in the people and government is instituted for their protection, security, and benefit.” Ark. Const. art. 2, § 1.

Separation of power. Like the federal Constitution, Article IV, section 1 of the Arkansas Constitution authorizes division of the state government’s authority among its executive, legislative, and judicial branches. *See also* Ark. Const. arts. 5, 6, & Amend. 80. These branches perform the same essential functions as their federal counterparts.

2. The Arkansas State Court System: Jurisdiction of Arkansas state courts.

Circuit courts. The circuit courts of Arkansas have original jurisdiction over all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Ark. Code Ann. § 16-13-201(a). In addition, circuit courts have appellate jurisdiction over judgments and final orders of county, district, city, and police courts, as well as the decisions of any inferior board, council, or tribunal in the contest of any county, township, or municipal office. *Id.* at § 201(b) & (c). Circuit court appellate review is always *de novo*. *Id.*

County courts. The county court of each county has exclusive original jurisdiction in all matters relating to county taxes and county administrative actions affecting the conduct of public human services programs serving indigent residents, juvenile matters, county financial activities and works of general public utility. Ark. Const. Art. 7, § 28.

District and city courts. District and city courts have original, exclusive jurisdiction over trials of violations of city ordinances. District and city courts have concurrent original jurisdiction with the circuit court for violations of misdemeanors under state laws committed in the city where the court is located. Ark. Code Ann. § 16-88-101(a)(4) & (5), *as amended by* § 1 of 2009 Act 398.

Appellate court jurisdiction. With a few limited exceptions, the Arkansas Supreme Court and Court of Appeals generally have appellate jurisdiction. With a few limited exceptions, all appeals are filed with the Arkansas Court of Appeals, and the Arkansas Supreme Court may then reassign appeals that present significant or novel issues. Ark. R. Sup. Ct. 1-2.

Venue. All actions must be brought in a court located in the appropriate county. Ark. Code Ann. § 16-55-213. These venue determinations are governed by statute. *Id.* The defendant can waive venue in an action. *Id.* at § 213(d).

3. State Agencies

Various state agencies and boards have jurisdiction over matters of public health. These agencies and boards promulgate rules and regulations governing everything from the licensing of health care facilities to restaurant inspections to tattoo parlors. Persons and entities that are governed by agency rules and regulations are subject to a range of penalties for violations of those provisions. The primary state administrative bodies that regulate matters of public health include the Department of Health, the Department of Human Services, the Health Services Permit Agency, and various state professional licensing boards, such as the State Medical Board.

SECTION THREE: SOCIAL DISTANCING

Social distancing, or community infection control measures, are crucial to preventing the spread of disease in the face of a pandemic. Centers for Disease Control and Prevention, Public

Health Law Program, *The Social Distancing Law Assessment Template 3* (2008). Social distancing works by reducing the opportunity for healthy individuals to come into contact with infected individuals, thereby reducing the spread of the disease or infection. *Id.* In essence, social distancing is separating healthy individuals from sick ones to prevent the spread of infection. Since children and teenagers are groups that quickly spread infection, one of the most important social distancing measures a state can undertake is creating a procedure governing school closings. *See* Robert J. Glass et al., *Targeted Social Distancing Design for Pandemic Influenza*, 12:11 *Emerging Infectious Diseases* 1671, 1674 (2006) (“children and teenagers compose only 29% of the population yet they are responsible for 59% of infectious contacts”). Other examples of social distancing measures include closing roads or restricting travel of citizen’s within a jurisdiction. *Id.* at 1671.

In the article by Robert Glass et al., a simulation of epidemic level influenza took place. *Id.* Through this simulation, the authors were able to impose behavioral rules on people and evaluate how those rules operated in the crisis. In other words, social distancing measures can be practiced and evaluated for effectiveness before a public health crisis occurs, making them very valuable tools.

A. Closing Schools

Arkansas Code Annotated § 6-11-105(a)(4) authorizes the State Board of Education (“Board of Education”) to prescribe rules and regulations for the sanitary inspection of all buildings and for the examination of pupils to detect contagious and infectious disease and physical defects.* The Board of Education is also authorized to take other such actions as it deems necessary to promote the “physical welfare of school children.” *Id.* at § 105(a)(9)(A).

* If passed, legislation pending before the Arkansas Senate will abolish the Board of Education’s power to make rules for the sanitary inspection of all buildings. *See* 2009 Act ARSB 861.

The Director of ADH also has the authority to impose “such quarantine restrictions and regulations” as he or she deems are necessary to prevent the introduction of communicable diseases into the state or from one part of the state to another. Ark. State Board of Health Rules and Regs. Pertaining to Communicable Disease § X(A). This authority includes the power to enforce a modified quarantine. The definition of modified quarantine in the rules and regulations includes the “exclusion of children from schools.” Id. at § I(G). Therefore, it would appear that the Director of ADH has the power to exclude children from schools under a modified quarantine order if he or she deems it necessary to prevent the spread of a communicable disease.

B. Other Social Distancing Measures

Under the AESA, the governor has the power to issue any executive orders, regulations, or proclamations he or she deems necessary to mitigate or prevent the effects of the disaster. Ark. Code Ann. § 12-75-114(b)(1). Any orders, regulations, proclamations issued pursuant to this authority have the effect of law. Id. at § 114(b)(2). That provision of AESA specifically grants the governor the authority to “control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein;” and to proscribe routes, modes of transportation, and destinations in connection with any evacuations. Id. at § 114(e)(6) & (7). Therefore, it appears the Governor has the authority to implement social distancing measures to mitigate the effects of a disaster or emergency.

SECTION FOUR: MUTUAL AID

Health care professionals, including doctors, nurses, and public health practitioners, can easily become overwhelmed during an emergency. James G. Hodge et al., *Volunteerism in the Wake of Hurricane Katrina: The Uniform Emergency Volunteer Health Practitioners Act*, Disaster Medicine and Public Health Preparedness, 1:1, 44, 45. U.S. Congress and all 50 states

have attempted to deal with this problem through what is known as mutual aid arrangements. *Id.* Mutual aid agreements can be made between the Federal Government and the States or among the states themselves. One example of Congress's attempt to create avenues for mutual aid is the Pandemic All-Hazards Preparedness Act (PAHPA). 42 U.S.C. §§ 300hh et seq.* Under the PAHPA, the Department of Health and Human Services can link and oversee the volunteer health personnel called up for federal service through certain federal systems. *Id.*; Hodge, *supra*, at 45. Examples of mutual aid agreements are outlined below.

A. The Uniform Emergency Volunteer Health Practitioners Act

The Uniform Emergency Volunteer Health Practitioners Act (UEVHPA) was introduced during the 87th Legislative Session in Arkansas in 2009. *See* 2009 Act 432. The UEVHPA was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The purpose of the UEVHPA is to “establish a robust and redundant system to quickly and efficiently facilitate the deployment and use of licensed practitioners to provide health and veterinary services in response to declared incidents of disasters and emergencies. UEVHPA, UEVHPA Prefatory Note at <http://www.uevhpa.org/DesktopDefault.aspx?tabindex=1&tabid=55>, retrieved on Dec. 5, 2008.

The UEVHPA does the following to help to facilitate disaster relief:

1. establishes a system for the use of volunteer health practitioners capable of functioning autonomously even when routine methods of communication are disrupted;
2. provides reasonable safeguards to assure that health practitioners are appropriately licensed and regulated to protect the public's health; and
3. allows states to regulate, direct and restrict the scope and extent of services provided by volunteer health practitioners to promote disaster recovery operations.

* Currently, there is proposed legislation to amend this Act before Congress. *See* 2009 Cong. U.S. HR 903.

Id. This Act will make it easier for volunteer health professionals to respond to public health emergency situations in Arkansas.

B. Emergency Management Assistance Compact

All fifty states, D.C., and three U.S. territories have enacted legislation to become members of the Emergency Management Assistance Compact (“EMAC”). Centers for Disease Control and Prevention, *CDC Support for the Emergency Management Assistance Compact* at www.bt.cdc.gov/planning/emac, retrieved on Dec. 5, 2008. Arkansas joined EMAC with the passage of Arkansas Code Annotated § 12-49-401 et seq. The CDC has listed several benefits to EMAC, including:

1. increased collaboration among states for emergency planning, preparedness, and response;
2. better awareness and understanding of state and local emergency planning and preparedness needs;
3. increased access to personnel, equipment, and resources;
4. consideration of legal issues related to worker compensation, liability, credentialing, and reimbursement.

Centers for Disease Control and Prevention, *CDC Support for the Emergency Management Assistance Compact* at www.bt.cdc.gov/planning/emac, retrieved on Dec. 5, 2008.

C. Arkansas Emergency Services Act

One purpose of the AESA is to “provide for the rendering of mutual aid among the political subdivisions of the state and with others states and to cooperate with the federal government with respect to carrying out emergency management functions.” Ark. Code Ann. § 12-75-102(a)(3), *as amended by* § 15 of 2009 Act 165. Arkansas Code Annotated § 12-75-108(b)(1) states that when a local disaster emergency is declared, “the response and recovery

aspects of any and all applicable local or interjurisdictional disaster emergency plans” are activated and furnishing aid and assistance under those plans is authorized. The Arkansas Department of Emergency Management (“ADEM”) is responsible for establishing and training professionals to assist regular employees during an emergency. *Id.* at § 109(d), *as amended by* § 31 of 2009 Act 165. ADEM also organizes measures for prompt response to disasters and the manpower and chains of command necessary to do so. *Id.* at § 110(a)(2)&(9), *as amended by* § 32 of 2009 Act 165. Therefore, it is ADEM’s duty to create mutual aid agreements between separate jurisdictions with the State of Arkansas.

D. Memorandums Of Understanding

Another example of a mutual aid agreement between two states is the Memorandum of Understanding (MOU). A MOU is like a contract between two states for the provision of volunteers and services during an emergency. For example, the State of Arkansas has made a MOU with the State of Louisiana to provide non-medical mass care and shelter for citizens of either state affected by an emergency or disaster. *See the attached* Example of a Memorandum of Understanding.

SECTION FIVE: OTHER AREAS OF PUBLIC HEALTH REGULATION

A. Health Care Facility Permits And Licenses

When planning how health care is going to be provided in an emergency, it is important for public health officials and legal experts to be aware of the laws and regulations governing health care facilities, particularly how these facilities are permitted or licensed to operate. In an emergency situation it might be necessary for a health care facility to offer services it does not normally offer or to increase the number of beds; these situations involve permitting and licensing laws. The Division of Health Services within ADH oversees the licensing of hospitals

and related institutions. The Health Services Permit Agency oversees the permitting of long term care facilities (LTCs) and home health care service agencies.

1. Division of Health Facilities Services

The Division of Health Facilities Services is the sole entity that oversees the inspection, regulation, and licensing of hospitals and related institutions. Ark. Code Ann. § 20-9-204(b)(3). Pursuant to the same subchapter, “no hospital, recuperation center, or related institution shall be established, conducted, or maintained in this state without obtaining a license.” Id. at § 213(a). The Board of Health may provide for the issuance of these licenses through properly promulgated rules and regulations. Id. at § 213(c). ADH has created two exceptions to the licensing requirements. Rules and Regs. for Hosps. and Related Insts. in Ark. § 4(A). All hospitals, recuperation centers, infirmaries, rehabilitation facilities, outpatient surgery centers, alcohol/drug abuse inpatient treatment centers, outpatient psychiatric centers, emergency services facilities, or distinct part thereof, must obtain a license to be established, conducted, or maintained in Arkansas, *except for* a facility operated by the federal government *or a first aid station*. Id. (emphasis added). Also, when the same management runs two separate institutions on two separate premises, the management must obtain separate permits for these institutions, unless it is management of a general hospital that is operating a detached building which can be utilized in a limited way for general medical care. Id. at § 4(F). The ADH is authorized to issue temporary licenses to facilities. Id. at § 4(G). These licenses last for less than one year. Id.

The Rules and Regulations for Hospitals and Related Institutions mandates that every licensed hospital must have an emergency department. Id. at § 36(A) (there are limited exceptions). If there is no other emergency service center in the community, ADH is empowered to license hospitals which no longer provide inpatient care to continue providing emergency

services. Id. at § 36(H). A facility licensed under § 36(H) must make agreements with other licensed facilities to accept patients in need of inpatient hospital services. Id. at § 36(H)(2).

2. Health Services Permit Agency

The Health Services Permit Agency (“HSPA”) is authorized to permit LTCs and home healthcare service agencies. Ark. Code Ann. §§ 20-8-101 et seq. Any of the following projects must submit a permit application for review by HSPA:

1. Nursing home construction with a capital expenditure of more than \$500,000.00;
2. Addition of LTC beds or expansion of LTC bed capacity;
3. Addition of home health services or expansion of home health service area;
4. Hospices or hospice programs; and
5. Cost overrun of more than fifteen percent in the previously permitted activity, if the cost overrun exceeds \$500,000 it is subject to full review instead of expedited review.

Ark. Health Servs. Comm’n Policies and Proc. for Permit Approval Rev. § III(A). Review is not limited to the activities listed above. Id. at § III(B). Any application for a permit under this subchapter must contain answers to following questions:

1. Whether the proposed project is needed or necessary to meet the needs of the locale or area;
2. Whether the proposed project can be adequately staffed and operated;
3. Whether the project is economically feasible; and
4. Whether the project will foster cost containment.

Ark. Code Ann. § 20-8-106(b)(3)(A). Any rules and regulations governing the permitting of LTCs and home health agencies are promulgated by the Health Services Permit Commission

(HSPC) pursuant to Arkansas Code Annotated § 20-8-103. The HSPC also hears appeals from the HSCA's decisions denying or approving permits. *Id.* at § 103(g)(1). The typical permit review process takes 90 days. *Id.* The HSPC has created an expedited review which only takes 30 days. Ark. Health Servs. Comm'n Policies and Proc. for Permit of Approval Rev § III(D). Any capital expenditures which are required to eliminate or prevent imminent safety hazards or to eliminate emergency circumstances that pose an imminent threat to public health and safety are eligible for the expedited review process. *Id.* at § III(D)(1). Also, the HSPC can approve an exception to the required review procedures. *Id.* at § VII(A). Obtaining an exception requires a favorable 75% vote of the full commission. *Id.*

B. Source Water Assessment And Protection Program

There is established on the books of the Arkansas Soil and Water Conservation Commission a special restricted fund to be known as the "Safe Drinking Water Fund," which shall be maintained in perpetuity and administered by the Commission and the Department of Health.

Ark. Code Ann. § 15-22-1102(a)(1). Pursuant to its authority under Arkansas Code Annotated § 20-7-109, the Board has issued the Rules and Regulations Pertaining to Public Water Systems. These regulations specify that the "quality of the water made available must conform to the National Primary Drinking Water Regulations," and if the Department of Health requires it, "the National Secondary Drinking Water Regulations." Ark. State Board of Health Rules and Reg. Pertaining to Pub. Water Sys. § V(A). If any owner fails to comply with any primary drinking water regulations, including monitoring requirements, the owner must report that failure to the ADH within 48 hours. *Id.* at § XVII(A). The owner also has to report any emergency condition in the water system which affects the ability of that system to deliver adequate amounts of safe drinking water to its customers *within four hours of discovery*. *Id.* (emphasis added). The owner must also notify the public of its failure to comply with the National Primary Drinking Water

Regulations or of any emergency conditions, as required by those regulations or the ADH. Id. § XVII(B).

C. Safe Disposal Of Infectious Waste

ADH is responsible for regulating the safe disposal of commercial medical waste within the state. Ark. Code Ann. § 20-32-106(a). ADH also licenses the treatment and transportation of commercial waste. Id. at § 107(a). The regulatory authority of ADH includes ensuring that medical wastes are packaged and identified properly. Id. at § 106.

Under Federal law, the Environmental Protection Agency (EPA) has the authority to manage hazardous waste. 42 U.S.C. §§ 6921—6939f. General hazardous waste standards can be found at 40 C.F.R. §§ 260 et seq. The Arkansas Department of Environmental Quality (“ADEQ”) has the authority to regulate waste disposal in Arkansas by delegation.

D. Safe Disposal Of Human Remains

The State Board of Embalmers and Funeral Directors is empowered to promulgate appropriate rules and regulations regarding the care and disposition of dead bodies in Arkansas. Ark. Code Ann. § 17-29-207(c).

Pursuant to the Arkansas Final Disposition Rights Act, a person who assumes original and lawful possession, charge, or control of a body is required to perform a diligent search for relatives or next of kin of the deceased, or may request the county sheriff or other appropriate candidate to conduct the search. Ark. Code Ann. § 20-17-702(a). If the identity of the deceased is not known, the investigation shall include, but not be limited to, taking fingerprints and sending the fingerprint records to the Federal Bureau of Investigation in Washington, D.C., for identification and filing. Id. at § 702(b). Generally, a person who removes a dead body or fetus from the place of death or who transports or disposes of a dead body or fetus is required to keep

a record of the information needed to help identify the body along with additional information pertaining to the receipt, removal, and delivery of the body as may be required in regulations adopted by the Board of Health. *Id.* at § 20-18-302(c). DNA test may be used to assist in the recovery or identification of human remains from disaster or other humanitarian purposes, such as the identification of missing persons. *Id.* at § 12-12-1111(c)(1).

It should be noted that the act allows persons of sound mind who eighteen years of age or older to execute a declaration that specifies the final disposition of his or her bodily remains at his or her death provided the disposition does not violate existing laws, rules, and practices for disposing of human remains. *Id.* at § 20-17-102(b)(1), *as amended by* § 1 of 2009 Act 402. It is a violation of the act for a person with possession, charge, or control of a declarant's human remains to knowingly dispose of the remains in a manner that is inconsistent with the declaration. *Id.* at § 102(c). If a person has not executed a declaration, then the statute specifies who has control of the final disposition of his or her remains. *Id.* at § 102(e), *as amended by* § 1 of 2009 Act 402. Human tissue that comes into the possession of a physician, hospital, or other institution is to be disposed of in accordance with the act. *Id.* at § 801(a)(3).

There are also federal regulations that govern the storing, transporting, and shipping of infectious human remains. Containers used for storing, transporting, or shipping of potentially infectious human remains or other potentially infectious materials must be labeled or color-coded and closed prior to storage, transportation, or shipment according to specifications set forth by federal regulations. 29 C.F.R. § 1910.1030(d)(2)(xiii)(A). The labels must be affixed to containers of regulated waste, refrigerators, and freezers containing or used for storage, transportation, or shipment of potentially infectious materials. *Id.* at § 1910.1030(g)(1)(i)(A). The labels must be either fluorescent orange or orange-red with lettering and symbols in a

contrasting color. Id. at § 1910.1030(g)(1)(i)(C). There are exceptions to these general labeling requirements, which can be found at 29 C.F.R. § 1910.1030(g).

If the primary container is contaminated by outside sources, it shall be placed in a second container which prevents leaks. Id. at § 1910.1030(d)(2)(xiii)(B). If the contents of the container could puncture the primary container, the primary container should be placed in the secondary container. Id. at § 1910.1030(d)(2)(xiii)(C).

PART THREE: PETITION CHECKLISTS AND MODEL ORDERS

A. MODEL SUBPOENAS

1. Subpoena for Investigations

Arkansas Code Annotated § 16-43-212 lays out the form for a subpoena that should be issued by prosecutors and their deputies in a criminal investigation. The following form should be used as a reference in similar government investigations, for example State Board of Health investigations into public health emergencies, such as pandemics.

A subpoena issued pursuant to an investigation should be substantially in the following form:

“The State of Arkansas to the Sheriff of _____ County: You are commanded to summon _____ to attend before the Prosecuting Attorney at _____, A.D. 20____.M., and testify in the matter of an investigation then to be conducted by the said Prosecuting Attorney growing out of a representation that _____ has committed the crime of _____ in said county. Witness my hand this _____, A.D. 20_____.

Prosecuting Attorney

By _____

Deputy Prosecuting Attorney

Source: Ark. Code Ann. § 16-43-212

2. Subpoena duces tecum

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS	

PLAINTIFF	
V. _____	CASE NO. _____

DEFENDANT	
TO: _____	
(Person being subpoenaed)	
SUBPOENA DUCES TECUM	
YOU ARE COMMANDED to appear in the Circuit Court of _____ County, Arkansas, at the place, date, and time specified below to testify in the above case.	
OR	
YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the taking of a deposition in the above case.	
_____	_____
(Place of Deposition/Courtroom)	(Date and Time)
YOU ARE COMMANDED, at the time of the (trial, hearing, or deposition) described above, to produce and permit inspection and copying of the following documents or objects:	
(LIST DOCUMENTS OR OBJECTS)	
Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Arkansas Rule of Civil Procedure 30(b)(6).	
_____	_____
(Issuing Officer Signature and Title)	(Date)
(Indicate if attorney for the Plaintiff or Defendant)	

(Issuing Officer's name, address, and phone number)	

Source: Arkansas Bar Association, Arkansas Form Book R 3-45.3 (2004).

**Attach a proof of service and a declaration of server to the Subpoena.

B. MODEL ORDER FOR ISOLATION

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

**PAUL K. HALVERSON, DIRECTOR
ARKANSAS DEPARTMENT OF HEALTH
AND STATE HEALTH OFFICER**

PETITIONER

VS. NO. _____

RESPONDENT

(NAME OF PATIENT)

ORDER

Now on this ____ day of _____, this cause comes to be heard pursuant to ARCP Rule 65 with the petitioner appearing before the court and the Respondent appearing/not appearing. The court being fully apprised of the pleadings, affidavits, and exhibits, hereby Orders the following:

FINDINGS OF FACT

1. Does the court find that the Respondent have an active case of a communicable disease?
2. Does the court find that the Respondent refuses to accept treatment for his communicable disease?

CONCLUSIONS OF LAW AND ORDER

1. Which facility should the Respondent be taken to?
2. Should the Respondent be placed in a special isolation room of the facility? What type of medical care should the Respondent receive?
3. How long should the Respondent be detained?

4. Respondent may request and will be granted an immediate hearing if the Order is not dissolved at the time specified herein. Furthermore, the Respondent shall not be detained after it is determined by medical staff for the State Health Officer in consultation with the Medical staff at the facility where he or she is being held that he or she is no longer a risk to the public or himself for ongoing infection.

THEREFORE, considering the pleadings and attached affidavit, the court finds that a *Temporary Emergency Public Health Restraining Order* is/is not issued to restrain, isolate, test, and treat Respondent until he is no longer a source of danger to himself or the public.

Source: Arkansas Department of Health

necessary and appropriate to arrest, control, and eradicate the threat to public health. Any additional control measures will be stated in further written instructions that I may issue.

6. Individuals in the quarantined area will not be allowed to leave the area without proper authorization from health or law enforcement authorities. Individuals outside the quarantine area will not be allowed to enter the area without proper authorization from health or law enforcement authorities.

7. The quarantine will continue for the period of time necessary to arrest, control, and eradicate the threat to public health. Once the area has been determined not to pose a threat to public health, the area quarantine will be terminated.

8. Notice of this order and any further instructions shall be published at least once each week during the area quarantine period in a newspaper of general circulation in the area and will include a brief explanation of the meaning and effect of this order and instructions. I may use other reasonable means of communication to inform persons in the quarantine area of my orders and instructions.

9. **Information about CD.** You should review the information contained at Attachment A for information about CD. In order to find out more information about CD and its symptoms and spread, you may access the Department's web-page at <http://www.healthyarkansas.com/health.html> If you do not have access to the internet, you may contact the Department at (800) insert number.

10. **Legal authority.** This order is issued pursuant to the legal authority contained at Ark. Code Ann. §§20-7-109 and 20-7-110 and Arkansas Board of Health Rules and Regulations Pertaining to Communicable Diseases and the Regulations for Administrative Appeals of the Arkansas State Board of Health, a copy of which is labeled Attachment B and is attached to this order for your review.

11. **Ensuring compliance.** In order to ensure that you strictly comply with this Quarantine Order the Department or persons authorized by the Department may contact you by telephone on a regular basis.

12. **Violations of order.** If you fail to comply with this Quarantine Order you may be ordered to be quarantined in a hospital or other facility as determined by the Department. In addition, failure to comply with this order is a violation of criminal law for which you may be arrested, fined, and imprisoned.

13. **Your rights – appeal rights.** While under quarantine, you have the rights as described in the Regulations of the Arkansas State Board of Health for Administrative Appeal is contained in Attachment B. In addition, you have the right to appeal this order pursuant to Attachment B.

If you have questions, please contact (me by the means described below) (_____).

(This order is issued under my authority as the Arkansas Department of Health.)

Signature: _____

Date: _____

Printed name: _____

Physical address: _____

Mailing address: _____

Paul K. Halverson

Paul K. Halverson, State Health Officer
ARKANSAS DEPARTMENT OF HEALTH

DATE

I have read and understand the above Quarantine Order

Signature

Date

Attachments to this Order: Attachment A -- Facts About CD

Attachment B – Arkansas statute and Board of Health Regulations

Source: Arkansas Department of Health

D. MODEL PETITION FOR A WRIT OF HABEAS CORPUS

[TITLE OF COURT]

[Plaintiff, Petitioner]

V.

No. _____

[Designate name of document]

[Defendant, Respondent]

PETITION FOR WRIT OF HABEAS CORPUS

The petition respectfully shows:

1. Petitioner, _____, is illegally restrained of liberty by respondent, _____, as Sheriff of _____ County in the county jail located at _____.

2. Petitioner is being held under a warrant issued by _____, Judge of the _____ Court of _____, State of _____, based on a complaint filed in the court. Copies of the warrant and complaint are attached, marked Exhibits " _____ " and " _____ " respectively, and made a part of this pleading.

3. The supposed offense charged against petitioner is not an offense against the criminal laws of the State of _____, because it affirmatively appears from the complaint that _____ *[set forth facts showing that matters stated in complaint do not, and cannot be set forth so as to, charge an offense, as for example in the case of an ordinance regulating the character and extent of repairs to buildings within fire limits, where the complaint shows the building involved was not within the fire limits].*

Wherefore, petitioner requests that a writ of habeas corpus issue in petitioner's behalf commanding respondent to produce petitioner's custody before the court to be dealt with according to law.

[Signature]

[Verification, if required]

Source: 13 Am. Jur. Pl. & Pr. Forms Habeas Corpus § 76 (Westlaw 2008).

**E. EXAMPLE MEMORANDUM OF UNDERSTANDING
(MEMORANDUM OF AGREEMENT)**

MEMORANDUM OF AGREEMENT
For Definitive Medical Care

1. PARTIES

The parties to this Memorandum of Agreement (the Agreement) are _____ (the provider) and the National Disaster Medical System (NDMS) that consists of a coordinated partnership among the Department of Homeland Security, the Department of Health and Human Services, the Department of Veteran Affairs, and the Department of Defense, collectively the NDMS Federal Partners.

2. AUTHORITY

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. § 300hh-11, *as amended* by the Homeland Security Act of 2002, 6 U.S.C. § 313(5) (the NDMS statute).

3. PURPOSE

A. The NDMS statute provides that NDMS shall be a coordinated effort by the NDMS Federal Partners, working in collaboration with the States and other appropriate public or private entities, to (i) provide health services, health-related social services, other appropriate human services, and appropriate auxiliary services to respond to the needs of victims of a public health emergency and (ii) be present at locations, and for limited periods of time, when such locations are at risk of a public health emergency during the time specified.

B. This Agreement is to help ensure that the United States is prepared to respond medically to mass casualty emergency situations in this country, or to military patients returning from overseas by facilitating a coordinated response of both federal and civilian health care facilities.

C. The NDMS Federal Partners acknowledge the willingness of the various medical communities within the United States to respond to a catastrophic public health emergency, and the need for unusually rapid and complex response, transportation, and treatment. A rapid response requires the development of a comprehensive emergency medical plan so that those patients needing definitive medical care would receive it in federal or private sector hospitals in the United States.

4. RESPONSIBILITIES

A. The NDMS Federal partners and the Provider agree to plan jointly for the admission, treatment, and discharge of all patients transferred to the Provider's facility under the NDMS.

B. The Provider agrees to seek reimbursement from the NDMS only after seeking reimbursement from all other payers, such as health insurers on TRICARE, except another Federally recognized payer of last resort, such as Medicaid.

C. Subject to the availability of appropriation, the NDMS will reimburse the Provider for medical treatment or services rendered by the Provider as indicated in Paragraph 5 below.

D. The Provider agrees to participate in joint annual exercises meeting external disaster standards established by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) or the American Osteopathic Hospital Association.

E. The Provider agrees that upon activation of NDMS it will make available to the NDMS Federal Partners, a minimum of _____ to a maximum of _____ beds with all necessary treatment and processing as may be required for the patients to be admitted as a consequence of the catastrophic public health emergency.

F. The Provider agrees to report the number of beds available when requested to support NDMS exercises or operations.

5. REIMBURSEMENT

A. Reimbursements will be limited to care provider for: injuries or illnesses resulting directly from a specified public health emergency; injuries, illnesses, and conditions requiring essential medical services necessary to maintain a reasonable level of health temporarily not available as a result of the public health emergency; or injuries or illnesses affecting authorized emergency response and disaster relief personnel responding to the public health emergency.

B. For patients who do not have health insurance (or similar) coverage and/or for patients whose only health coverage is Medicaid, NDMS will pay 10% of the Medicare payment amount that would be applicable to the services provided at the time of the public health emergency.

C. For patients with health insurance or health program coverage (other than Medicaid), the health insurer or health program will be the primary payer. For patients other than Medicare or TRICARE beneficiaries, NDMS will pay the difference, if any, between the amount paid by the health insurance coverage and the amount payable under paragraph B above, not including the deductible amount and other cost sharing under the health insurance or health program coverage.

D. For patients eligible for military health coverage (i.e., TRICARE) payments will be made under TRICARE according to the applicable payment rates and procedures, as set forth in 32 C.F.R. Part 199.

E. NDMS payment will end when one of the following occurs, whichever comes first: completion of medically indicated treatment (maximum of 30 days); voluntary refusal of care;

return home or to point of origin/fiscally comparable location or to destination of choice for patient (whichever costs less).

6. POINTS OF CONTACT

A. For the NDMS Partners _____

B. For the Providers _____

7. OTHER PROVISIONS

A. Notwithstanding anything in this Agreement, each of the NDMS Federal Partners and the Provider shall have the exclusive authority to direct its employees and to implement its own statutory responsibilities.

B. Nothing in this Agreement is intended to conflict with current federal or state law, or the regulations or directives of the NDMS Federal Partners or the Provider. If a term of the Agreement is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of the Agreement shall remain in full force and effect.

8. EFFECTIVE DATE

This Agreement shall become effective upon signature of one of the NDMS Federal Partners and the Provider.

9. TERMINATION

The Provider or any of the NDMS Federal Partners may withdraw from this Agreement upon 90 days notice in writing to the other parties.

10. SIGNATURES

_____ Date: _____

For the National Disaster Medical System

Printed Name: _____

Title: _____

_____ Date: _____

For the Provider _____

Printed Name: _____

Title: _____

Source: National Disaster Medical System

PART FOUR: CONTACT INFORMATION

A. Arkansas Department Of Health Contact Information:

1. Address:

4815 West Markham
Little Rock, Arkansas, 72203.

2. Contact Numbers:

Office	Phone Number
ADH Main Office	(501) 661-2000
Director's Office	(501) 661-2111
Center for Local Public Health	(501) 661-2574
Central Region	(501) 280-4950
Northeast Region	(870) 251-2848
Northwest Region	(479) 675-2593
Southeast Region	(501) 661-2269
Southwest Region	(870) 773-2108
Environmental Health Protection	(501) 661-2171
Emergency Communications Center	(800) 651-3493
Emergency Management	(501) 661-2301
Emergency Medical Services	(501) 661-2262
Health Statistics	(501) 661-2497
HIV/AIDS Surveillance	(501) 661-2971
Hospital Preparedness	(501) 280-4827
Immunizations	(501) 661-2169
Pharmacy Services & Drug Control	(501) 661-2325
Public Health Laboratory	(501) 661-220
Radiation Control	(501) 661-2301
Tuberculosis	(501) 661-2152

B. Where To Report Communicable Diseases:

1. The Communicable Disease Reporting System

Toll Free Number: 1-800-482-8888

2. The Division of Epidemiology, Arkansas Department of Health

Business Hours: (501) 661-2893

After Hours: 1-800-554-5738

**Call the Division of Epidemiology for more information regarding reportable diseases.*

3. To report diseases of special importance to the Department of Health:

In Pulaski County: (501) 661-2893

Between hours of 8:00AM-4:30PM

<p>PART FIVE: ARKANSAS STATE BOARD OF HEALTH RULES AND REGULATIONS PERTAINING TO COMMUNICABLE DISEASE § V.</p>

A. Notifiable Diseases And Conditions:

AIDS*
 Anthrax**
 Blastomycosis
 Botulism** (including Infant Botulism)
 Brucellosis
 CD4+ T-Lymphocyte Count
 Campylobacteriosis
 Chancroid
 Chlamydial Infections
 Cholera
 Congenital Rubella syndrome
 Congenital Syphilis
 Creutzfeld-Jakob Disease
 Cryptosporidiosis
 Cyclosporiasis
 Diphtheria
 Ehrlichiosis
 Encephalitis, all types
 Enterotoxigenic E. coli
 Food Poisoning, all types
 Giardiasis
 Gonorrhea
 Haemophilus influenzae Invasive Disease
 Hantavirus Pulmonary Syndrome
 Hemolytic-Uremic Syndrome
 Hepatitis (Type A**, B, C, non-A-non B, or unspecified)
 Histoplasmosis
 H.I.V. (Human Immunodeficiency Virus)*
 Influenza (Indicate viral type if known)
 Kawasaki Disease
 Legionellosis
 Leprosy
 Listeriosis
 Lyme Disease
 Malaria
 Measles (Rubeola)
 Meningitis, all types
 Meningococcal Infections**
 Mumps

Pertussis** (Whooping Cough)
 Plague**
 Poliomyelitis
 Psittacosis
 Q Fever**
 Rabies, Animal
 Rabies, Human
 Rheumatic Fever
 Rocky Mountain Spotted Fever
 Rubella
 SARS**
 Salmonellosis (Including Typhoid)
 Shigellosis
 Streptococcal Disease, Invasive Group A
 Strep. Pneumoniae, Invasive, drug-resistant
 Strep. Pneumoniae, Invasive, not resistant
 Syphilis*
 Tetanus
 Toxic Shock Syndrome
 Toxoplasmosis
 Tuberculosis
 Tularemia**
 Typhus**
 Vancomycin-resistant enterococci
 Varicella (Chickenpox), deaths only
 Variola** (Smallpox)
 Viral Hemorrhagic Fevers**
 West Nile Virus
 Yellow Fever

* Any woman infected with AIDS, HIV or Syphilis, who is pregnant, must be so reported indicating the trimester of pregnancy. This applies each time the woman becomes pregnant.

** These diseases (suspected or confirmed) must be reported immediately to the Arkansas Division of Health. These diseases are of special importance or may indicate a bioterrorism event. If it is a local call, or you are in Pulaski County, report to (501) 661-2893 between the hours of 8:00 a.m. – 4:30 p.m. All other suspected or confirmed cases must be reported to (800) 554-5738. This line is available twenty-four hours a day.

B. Reportable Occupational Diseases And Other Conditions:

Asbestosis
 Blood Lead Levels*
 Byssinosis
 Chemical poisoning, All Types **
 Pesticide Poisoning
 Pneumoconiosis (Coal Workers)

Mesothelioma
Silicosis

* Blood lead levels over 10 ug/dl for patients 14 years old or younger and levels over 25 ug/dl for patients 15 years old and up.

** Includes chemical agents of terrorism

C. Report any unusual diseases or outbreaks that may require public health assistance. Any unusual disease or outbreak must be reported immediately to the Division of Health. If it is a local call, or you are in Pulaski County, report to (501) 661-2893 between the hours of 8:00 a.m. – 4:30 p.m. All other suspected or confirmed cases must be reported to (800) 554-5738. This line is available twenty-four hours a day.

D. The following bacterial isolates must be submitted upon request to the Department laboratory for identification/fingerprinting. In addition, the results of any Pulsed Field Gel Electrophoresis tests involving the following bacterial isolates must be submitted.

Campylobacter sp.
Enterotoxigenic E. coli
Haemophilus influenzae (invasive)
Listeria sp.
Mycobacterium tuberculosis complex