



# The Legal Basis of Public Health

An Individual or Group Study Course in Ten Modules

## Module 6 Enforcement

SS0006



**CDC**  
CENTERS FOR DISEASE CONTROL AND PREVENTION

## ***The Legal Basis of Public Health***

SS0006 - Module 6 - Part I, Enforcement

### **Continuing Nursing Education (CNE)**

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# *The Legal Basis of Public Health*

## **Authors**

Babette Neuberger, JD, MPH	Tom Christoffel, JD
Associate Dean for Academic Affairs	Professor of Public Health (retired)
University of Illinois-Chicago	Consultant and Writer
School of Public Health	Boulder, Colorado

## **Course Design**

Babette Neuberger, JD, MPH	Catherine B. Shoemaker, MEd
Associate Dean for Academic Affairs	Senior Instructional Designer
University of Illinois-Chicago	Division of Media and Training, PHPPO
School of Public Health	Centers for Disease Control and Prevention
	Public Health Training Network

## **Writing and Design Consultant**

Sharon Cramer Bell, Ed.M  
Publications Consultant  
Decatur, Georgia

## **Content Reviewer**

Verla Neslund, JD  
Deputy Legal Advisor to CDC and ATSDR  
Centers for Disease Control and Prevention  
Agency for Toxic Substances and Disease Registry

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## About the Authors

**Babette Neuberger** is a faculty member and the Associate Dean for Academic Affairs at the University of Illinois at Chicago School of Public Health. She holds a law degree and masters of public health degree, and specializes in the field of environmental and occupational health law and policy. Professor Neuberger teaches courses on public health law, the political process, negotiations, environmental and public health policy. She was an environmental enforcement attorney with the United States Environmental Protection Agency and has taught numerous training courses for environmental health staff at the state and federal level. Professor Neuberger is a member of the Illinois Bar.

**Tom Christoffel** is a lawyer by training, with particular interest in the use of law to protect the public from injury. He has been an educator for most of his career, including twenty years on the faculty of the University of Illinois at Chicago School of Public Health. He has developed and taught courses on public health law, injury prevention, government regulation, health care politics, policy analysis, and related subjects. He currently holds adjunct faculty appointments at the UIC School of Public Health, the Johns Hopkins University School of Hygiene and Public Health, and the University of Colorado School of Medicine. Professor Christoffel's books include *Health and the Law: A Handbook for Health Professionals*, *Protecting the Public: Legal Issues in Injury Prevention* (with Stephen P. Teret) and *Injury Prevention and Public Health: Practical Knowledge, Skills, and Strategies* (with Susan Scavo Gallagher). He is also the author of numerous book chapters and journal articles on law, public health, injury prevention, evaluation methodology, medical peer review, and other topics. Professor Christoffel is a Trustee of the Civil Justice Foundation, a member of the Editorial Board of the Journal of Public Health Policy, and a member of the Massachusetts Bar. He is currently a consultant and freelance writer in Boulder, Colorado.

## **Course Contents**

This course consists of the following ten modules and a Coordinator Guide, which includes suggestions for using the course materials.

<b>SS0001</b>	<b>Module 1, Introduction</b>
<b>SS0002</b>	<b>Module 2, Data Collection and Surveillance</b>
<b>SS0003</b>	<b>Module 3, Service Delivery</b>
<b>SS0004</b>	<b>Module 4, Licensing</b>
<b>SS0005</b>	<b>Module 5, Inspections</b>
<b>SS0006</b>	<b>Module 6, Enforcement</b>
<b>SS0007</b>	<b>Module 7, Policy Development</b>
<b>SS0008</b>	<b>Module 8, Negotiation</b>
<b>SS0009</b>	<b>Module 9, Communication</b>
<b>SS0010</b>	<b>Module 10, Responsibility and Liability</b>

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# About this module

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## Overview

Every link in the public health enforcement process must be strong.

State statutes and local ordinances provide considerable authority for public health enforcement actions. The courts have consistently upheld the exercise of this broad authority, viewing public health enforcement as critical to effective public health protection. Public health enforcement is a process, an interconnected set of activities which support effective public health protection. Because of this interconnectedness, a weakness at any single point in the process can destroy the effectiveness of an entire enforcement action.

Understanding the steps, basic principles, the legal rules surrounding enforcement, and basic rules of evidence will enable you to conduct compliance activities in a manner which supports the enforcement process. Such understanding will also enable you to work efficiently and effectively with attorneys to prepare and prosecute enforcement actions.

## Module components

This module consists of the following components:

- Text and self-study exercises to be completed individually or discussed with your learning community. These exercises are meant to help you absorb what you have just read and immediately apply the concepts.
- A self-check review, found at the end of the text, will help you assess your understanding of the material.
- Group exercises to undertake with your learning community, found at the end of the text.

## Goals

1. To acquaint you with legal issues arising in the enforcement context.
2. To demystify the legal system enabling you to attain a level of comfort with the enforcement process
3. To improve your communication and participation in the development of enforcement actions.
4. To reinforce the idea that you as a public health official have broad enforcement authority.

## Learning objectives

After completing this module, you should be able to:

1. Describe the three basic legal principles that determine whether a party's "proof" may be admitted into evidence.
2. Describe the stages of the development of a legal enforcement action.
3. Describe the array of legal remedies available to public health agencies for use against public health law violators.
4. Distinguish between conduct appropriate for a civil enforcement investigation and conduct appropriate for a criminal enforcement matter.





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## Start by networking...

Whether you are studying this material in a group or by yourself, you may run into confusing sections or want to know more about a topic. Take time now to think about people or other resources that you can access. Here are some suggestions of where to begin. You should add others that occur to you.

- Your agency's legal counsel
  - Local prosecutors and judges
  - Colleagues who have carried out enforcement procedures, testified in court, or followed up on court ordered penalties
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# Introduction

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At least two-thirds of all state public health agencies are involved in enforcement activities, ranging from food and milk control, to product and housing safety standards, to health facility regulation. In one survey, some thirty-eight state health agencies reported involvement with some aspect of environmental assurance activities, including air quality, radiation safety, sewage disposal, water supply purity, and hazardous waste management.<sup>1</sup>

## Enforcement defined

Efforts to ensure compliance with public health and safety laws

In its broadest sense, enforcement may be considered as all efforts taken by an agency to ensure compliance with federal, state, and local statutes, ordinances and regulations intended to protect the public's health and safety. Public health enforcement may include educational programs to inform the regulated community, judges, police officers, and others about new and existing rules. It may also include an agency's inspection program which is carried out to make sure the rules are followed and requirements met.

Other modules in this course have provided the legal basis and understanding of how to fulfill the compliance function in a lawful manner. This module will focus on the narrower aspects of "enforcement," actions taken once a violation or public health threat has been discovered.

Many remedies are available and negotiation is the preferred option.

Upon discovery of a violation or threatening situation, you must think strategically about which enforcement option or option(s) to pursue ranging from informal actions, to administrative, civil, and criminal proceedings. Compliance with agency rules is most effectively achieved when the appropriate sanctions are selected from among the full array of remedies that are available to the agency. **The more thoroughly compliance and enforcement functions are performed, the more likely problems can be settled through negotiation rather than tried in a court of law.**

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<sup>1</sup> Public Health Foundation, 1986

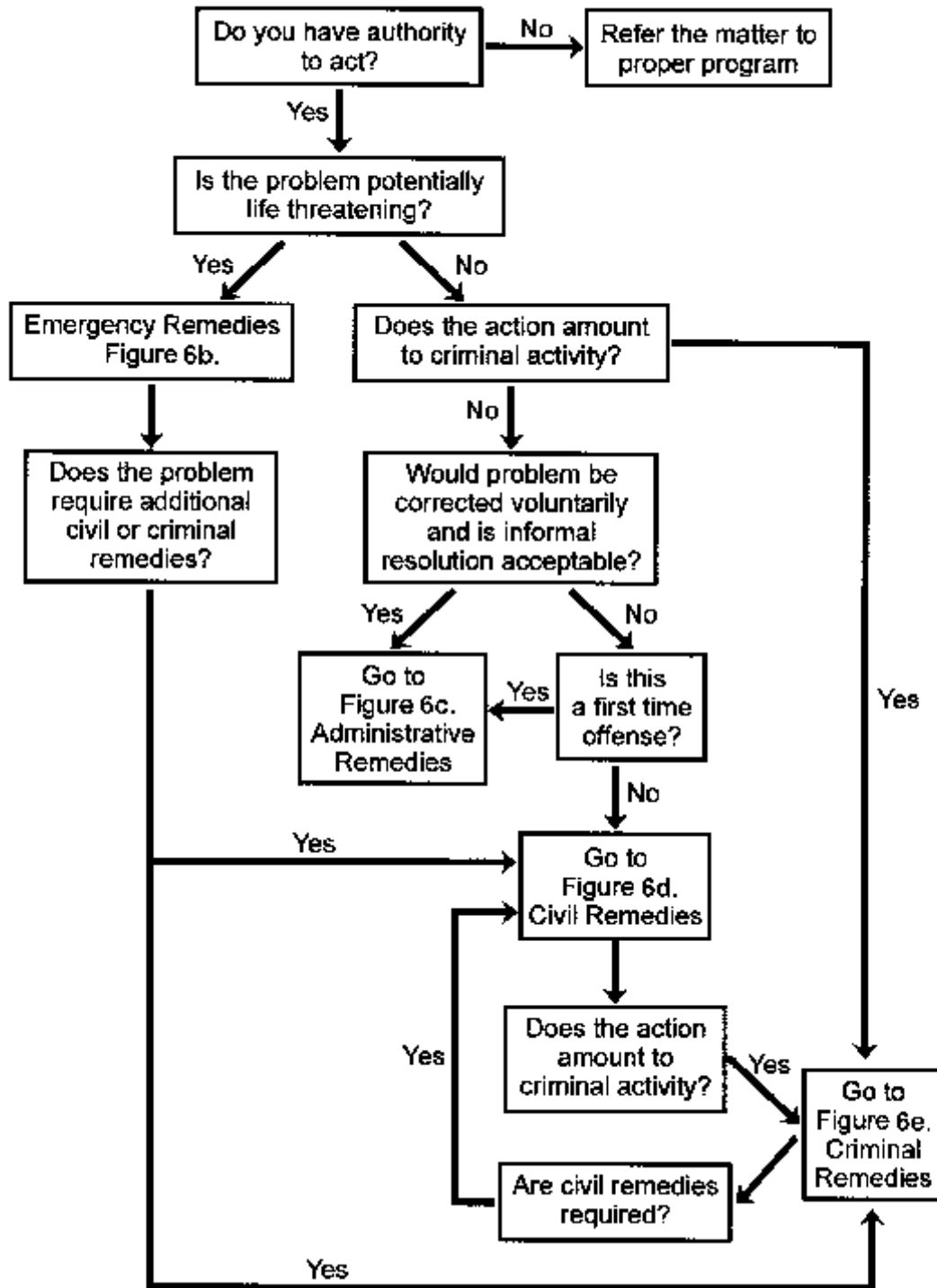
## The decision tree

The organization of this module is based on a Decision Tree. In making decisions about which enforcement responses to select, you will be asking a series of questions. Every time you come to a juncture, you must consider the legal principles that apply to each choice. This module will lead you through the questions, possible responses, and related legal principles. Some of these questions will be asked more than once, they may be asked in a different order than shown below and some processes may be operating parallel to others.

Before you proceed it may be helpful to briefly walk through the Decision Tree now to familiarize yourself with the organization of this module. A diagram for a Decision Tree that covered the entire range of possible questions and decisions would be too complicated to fit on one page. Figure 6a. is a simplified diagram with the main junctures and questions. More detailed sections of the Decision Tree are inserted at the appropriate places in the text to help you visualize the process and the range of options for selecting the appropriate enforcement response(s).

Do you agree with the flow of the questions? Would you rearrange the order? If so, how?

**Figure 6a. Overview of the Enforcement Process Decision Tree**



# Legal authority to act

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Does the agency have legal authority to take action in the situation?

While public health agencies have broad authority to act, that authority is not absolute. A threshold question, therefore, is whether the agency has legal authority to take action to correct a threatening problem or violation. In the case of a public health code violation, agencies clearly have authority to enforce their public health codes. In other situations, however, the legal authority is less clear.

## Public v. private nuisances

One of the more challenging legal questions facing public health officials is determining the difference, legally and factually, between a "public" and "private" nuisance. The question is not purely one of semantics as a public nuisance is within the jurisdictional authority of public health officials, while the latter is off-limits. But when is a nuisance public and when is it private?

Private nuisances cause harm to one or a few individuals, or inflict injury different than that sustained by the general public.

*Black's Law Dictionary* defines a private nuisance as "any wrongful act which destroys or deteriorates the property of an individual or a few persons; or interferes with their lawful use and enjoyment of that property." Historically private nuisance law was concerned primarily with conduct interfering with an individual's interest in land. As the law has evolved it now encompasses activities which involve or interfere with *any* right or interest that is unique to an individual; or which cause a *unique* injury different from that sustained by the general public. A private nuisance forms the basis for a lawsuit between private parties. Public health agencies do not have legal authority to abate them.

The following examples illustrate situations where the courts have found a private nuisance:

1. Operating farming or manufacturing activities which emit noxious smoke, smells, or noise that adversely impacts the use or value of adjacent or nearby properties
2. Cases involving the erection of a tall structure which interferes with the scenic vista of a neighboring parcel of land
3. Maintaining dilapidated building structures or trees which are likely to fall and hence threaten to cause damage to adjacent land

Public nuisances are repeated, sustained and in a public place.

To constitute a public nuisance the conduct involved must be continuous and repeated, not a single isolated act. In addition, the nuisance must occur in a public place, affect a place where the public has a legal right to go, or stated most broadly, it must occur in a place where the public is likely to come within its influence. If the act or property is in a remote and unfrequented area, unless the conduct is a *nuisance per se*, it will not be considered a public nuisance.

A *nuisance per se* is inherently immoral.

*Nuisance per se* is a legal term which simply means that it is “a nuisance at all times and under all circumstances, regardless of location or surroundings.” Activities which give rise to a *nuisance per se* are activities that are inherently and essentially evil or immoral, or which constitute an outrage against public decency and morality; or conduct which constitutes a breach of the public order. For example, courts have held that operation of a “bawdy house” or “brothel” is a *nuisance per se*.

The following examples illustrate the type of situations where the courts have found a public nuisance:

1. Permitting conditions to exist which result in the breeding of mosquitoes, flies, or other disease-carrying insects that are detrimental to the health of persons residing nearby
2. Maintaining property as a haven for rodents
3. Poor maintenance of a building, resulting in the creation of a fire hazard, especially when coupled with other unsafe or unsanitary conditions
4. Maintaining a house in a filthy, unsanitary, and odorous condition
5. Allowing a building to be used in a harmful or illegal manner, such as maintaining a crack house

In some states public nuisances are defined by statute.

In some states the legislature has defined a public nuisance by statute. The legislature confers power on local boards and agencies to exercise their police power when a board or agency determines that conditions meet the legislated definition (58 Am Jur 2d, *Nuisances*, § 462). In other states, public health agencies have broad discretion to determine what constitutes a public nuisance.

In some states public nuisances are a crime.

Finally, in many states, public nuisances have been declared a crime by statute. In such cases, the public nuisance statute is a penal statute which must be strictly construed and applied only to cases clearly in line with the statute's terms. Constitutional guarantees affecting the accused would apply.

Can a nuisance be both public and private? The answer is yes. To illustrate the complexities of nuisance law, consider the opinion of Virginia's Supreme Court in *City of Virginia Beach v. Murphy*, 389 S.E.2d 462 (1990).

Quoting Judge Cardozo from a 1930 New York case, the Court pointed out that a public nuisance may arise in two situations:

Nuisances can sometimes be both public and private.

First, a nuisance is public when "a public right or privilege common to every person in the community is interrupted or interfered with" such as by obstruction of a public way. But a public nuisance can also arise when the noxious activities are committed "in such place and in such manner that the *aggregation of private injuries* becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community." The latter situation gives rise to both a public nuisance *and* a private nuisance, bringing the conduct within the authority of the public health agency.



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## Bringing it home...

Most of your agency's authority to act is no doubt clearly spelled out in your state's statutes. Which statute(s) give your agency authority to act?

In what type of situations is your agency's authority to act less clear cut?

Do your state's statutes define the term "public nuisance" or is the definition left to the agency's discretion?

If the latter, how does your agency determine when it has authority to take action to abate a nuisance?

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See Group exercise 6.1 at the end of the module.

## Enforcement options and remedies

Enforcement options can be informal, administrative, civil and/or criminal.

The array of enforcement options available to public health agencies may be categorized as 1) informal, 2) administrative, 3) civil, and 4) criminal. Administrative enforcement options offer remedies obtainable through relatively simple agency proceedings. Other remedies may include sanctions such as civil and criminal penalties, jail sentences or license revocation, and measures such as seizure, quarantine, isolation, embargo, destruction, condemnation, or nuisance abatement. Some remedies, for example injunctive relief, may only be obtained through a state civil court action; while others, such as jail sentences, can only be obtained in a criminal proceeding. The appropriate option will depend on the nature or gravity of the offense and the remedy sought.

### Emergency situations

Is the situation a public emergency?

Upon discovering a violation or public health problem the first question to ask is, "Is this a public emergency?" A public emergency has been described variously by the courts as a situation "threatening a public calamity" and a situation "presenting an imminent and controlling urgency, before which of necessity all private rights must give way."

See Figure 6b.

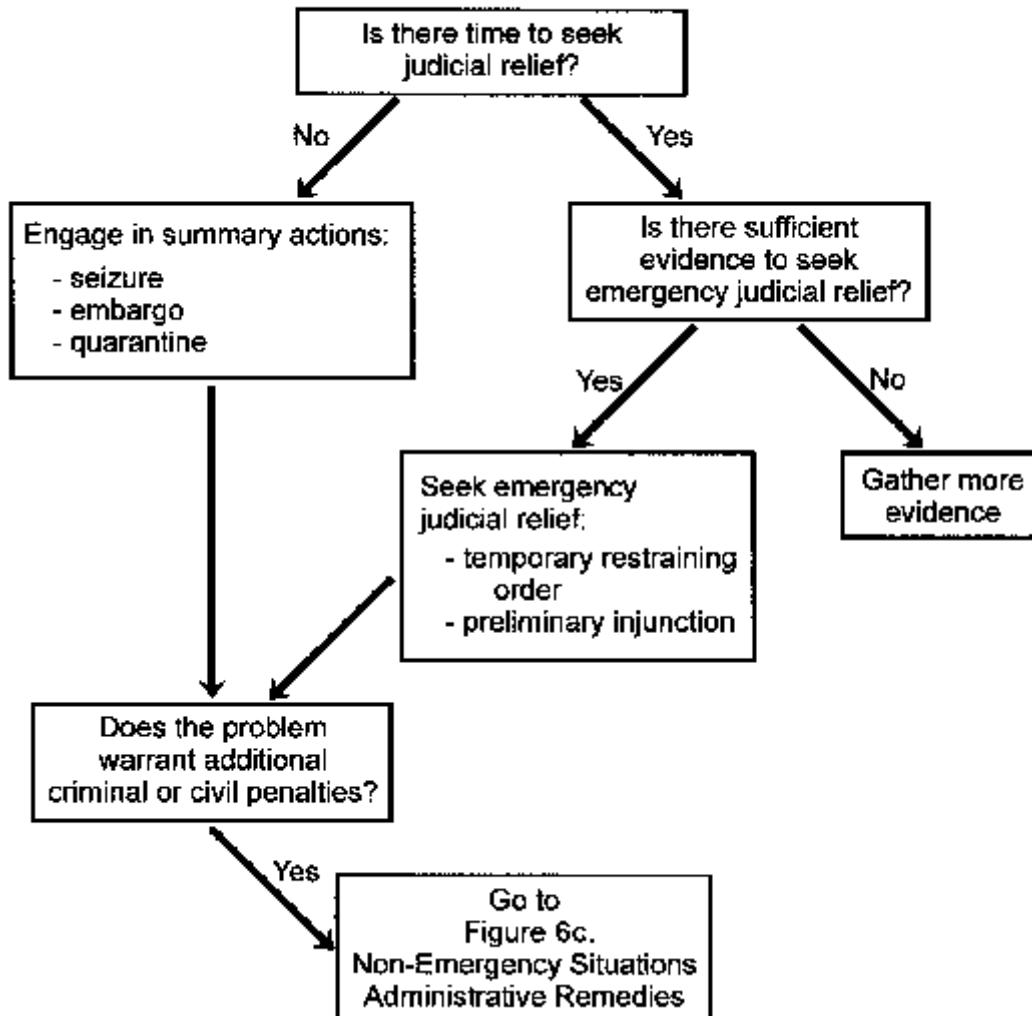
Can the situation be dealt with voluntarily?

If the situation constitutes a public emergency, the initial response is ordinarily to determine whether the situation can be abated through voluntary cooperative means. Where there is evidence of cooperation, you may obtain the desired results simply through discussion or by issuing an informal notice of noncompliance.

Is there sufficient time to obtain judicial relief?

If the owner cannot be found or refuses to cooperate, you must determine, in consultation with your superior and preferably legal counsel, whether there is time to go to court to obtain emergency judicial relief.

**Figure 6b. When It's an Emergency Situation**



Some questions to consider:

- Do you have ready access to an agency attorney?
- How long would it take the attorney to obtain judicial relief?
- How long has the situation existed? The longer the situation has existed the more likely it is that you have time to obtain judicial relief.



**See Group exercise 6.2 at the end of the module.**

### *Emergency judicial relief*

Emergency judicial relief includes temporary restraining orders, and preliminary injunctions.

Temporary  
restraining orders

A temporary restraining order is an order of the court forbidding a party to carry out a threatened act or continue an act in progress until a hearing can be held. The purpose of the temporary restraining order is to prevent a situation from deteriorating further during the time it takes the parties to litigate the matter. For example, if a construction company is demolishing a building in what is perceived as an unsafe manner, a court may issue a temporary restraining order forbidding further demolition until the court hears testimony from both the company and the government agency and renders a decision.

A temporary restraining order is obtained through an abbreviated court proceeding. It is a very useful option because it is swift, allowing you to obtain prompt relief to protect the public's health, while at the same time legitimizing your decision by providing court approval of agency activities.

Is there sufficient  
evidence to seek  
emergency judicial  
relief?

*Evidence required:* A court may issue a temporary restraining order based solely on the papers you have filed. This will normally include a complaint and your sworn affidavit (a written statement made under oath) describing the emergency conditions that pose a threat to the public's health. Often a temporary restraining order is granted without giving the other party notice of the emergency hearing or an opportunity to be present in court to give testimony.

*Burden of persuasion:* To prevail, you must convince the court that:

- There is a significant probability that irreparable harm will result if the injunctive relief is not granted.
- The agency is likely to succeed when the case goes fully to trial.
- In the situation at hand public protection outweighs the rights of the private parties involved.

Temporary restraining orders may last for only 10 days.

Because a temporary restraining order is usually based solely on testimony from the agency, the order will remain in effect for only a brief period of time--usually ten days.

### *Preliminary injunction*

Preliminary injunctions last until the time of the trial.

Near the time the temporary restraining order expires, the court will customarily hold a full hearing at which both parties have the opportunity to present evidence and arguments. The judge may then issue a preliminary injunction. A preliminary injunction is another temporary remedy, intended to prevent further harm from occurring during the time leading up to a full trial.

*Evidence required:* At a hearing on a preliminary injunction, the court will hear testimony and arguments from both parties. Oral testimony is often presented by the public health officer. Documentary evidence, such as photographs, is also extremely persuasive.

*Burden of persuasion:* The burden of persuasion is the same as that required to obtain a temporary restraining order, although in this instance the court is weighing the propriety of issuing an order that will remain in effect until the case goes fully to trial, which could be for a much longer period of time.

A permanent injunction may result from the trial.

Following a full trial, the court may issue a permanent injunction, an order permanently prohibiting the deleterious conduct or requiring the defendant to fully abate the threatening condition. An example of a "Petition for Temporary Restraining Order and Injunction" can be found in Appendix A.

*Extraordinary summary relief*

Authority to act when there is no time for court relief

When faced with a public emergency for which there is insufficient time to obtain court relief, public health agencies have inherent authority to promptly abate the threat. The authority derives from the agencies' police powers, that is, the extensive authority which states possess to protect public health and safety (see Module 1, Introduction.) As one Illinois court said in reviewing a city's decision to summarily destroy a dilapidated building,

“When an imminent danger to the safety of the public is posed by a structurally unsafe building, for whatever reason, the imposition of a notice requirement, a waiting period requirement, and then a requirement of applying to the circuit court for an authorization order, would have the effect of vitiating the essence of the City's inherent authority to protect the health and safety of its citizens.” [*City of Chicago v. Garrett*, 483 N.E.2nd 409, (1985) 414].

*Types of emergency relief affecting property: Embargoes, seizures, condemnation, and destruction of property*

Property can be embargoed, seized, condemned, or destroyed if deemed harmful.

Summary actions include the power to detain or embargo, seize, or even in limited situations, to destroy goods and articles that are deemed to be harmful. Public health officials have exercised their summary authority to confiscate and destroy spoiled food products, dangerous pets, misbranded drugs and cosmetics, contaminated animal feed, and a variety of unsafe consumer products.

In the case of detention or embargo, the agency tags the suspected product and issues a “Notice of Detention or Embargo” to the owner. While the product remains with the owner, the tag warns all persons not to remove, sell or otherwise dispose of the product until permission is granted by the agency or a court. Examples of a “Notice of Detention or Embargo” and a “Complaint for Forfeiture” are included in Appendix B. In contrast to an embargo, when an article is seized, the public health authority takes actual possession of the goods. An embargo or act of seizure is normally followed by a civil court proceeding to determine whether the goods should be destroyed or returned to the owner.

Arizona's Pure Food Control Laws describe the procedures that are typically required in instances of embargo and seizure (*Arizona Revised Statutes*, Title 36, Chapter 8 - Pure Food Control). The law authorizes the Director of the Department of Health Services to embargo any food that s/he believes to be dangerously or fraudulently adulterated or misbranded. If, upon investigation, the director finds the embargoed food was not adulterated or misbranded, s/he must remove or cancel the tag or other marking.

Misbranded foods  
can be condemned.

If the adulteration or misbranding is confirmed, the Director petitions the Superior Court of Arizona for an order condemning the food. If the court finds that the food is indeed adulterated or misbranded, it must further determine whether the problem can be corrected by proper processing or labeling.

Either food  
problems are fixed  
or the food is  
destroyed.

Where the problem can be corrected, the court will issue an order returning the food to the owner, who is then responsible for correcting the problem under the agency's supervision. The owner must also pay all expenses and post a bond to guarantee that the corrections will be made. Where the problem cannot be corrected, the court will order the food destroyed at the owner's expense.

Under certain circumstances Arizona law requires the Department of Health Services to seize or take possession of goods. For example, when the Director finds "perishable foods that are unsound or contain decomposed or putrid substances that may present an imminent threat to health, in any building, vehicle, or other structure, he or she is authorized to immediately seize the spoilt goods and may destroy them," unless the owner serves a written protest to such action within five days. Where the owner files a timely protest, the Director cannot summarily destroy the food but must petition the Arizona Superior Court for an order of condemnation, i.e., an order authorizing the food to be destroyed.



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## Bringing it home...

Do your state or local laws grant the health department embargo or seizure authority? Under which programs?

Do the procedures vary from Arizona's law? If so how?

Have you had personal experience in the detainment or seizure of dangerous products? With what results?

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### *Summary destruction of property*

Protection of public health must be balanced with an individual's property rights.

Health officials have the right to summarily destroy property, that is, to destroy property without giving the owner notice of or an opportunity to challenge the action, only when destruction is absolutely required to protect the public's health. Since the destruction of property results in a final, absolute infringement of an individual's right to possess the property (a right which cannot be restored by a later hearing), whenever the threat can be mitigated using less extreme measures, the property owner must first be given notice of and an opportunity to challenge the agency's determination.

*Challenges to summary actions affecting property*

Legal actions against public health agencies rarely succeed.

Persons whose property has been summarily embargoed, seized, or destroyed may sue the government, seeking compensation for the damages they have suffered. Such challenges rarely succeed because the suppression of harmful conditions to protect the public's health is a primary function of public health agencies. Courts are extremely reluctant to penalize public health officials who are acting in good faith. In fact, the owner is usually required to pay the government for expenses incurred in abating the health threat. In rare instances where the officer and/or agency has been ordered to compensate the owner, the owner's rights were egregiously violated.

As noted above, summary destruction of property should **only** be undertaken when circumstances absolutely require it to protect the public's health and safety. Grad offers the following cautionary recommendations to any official who is contemplating a summary action:<sup>2</sup>

1. You should become thoroughly acquainted with the legal authority. In some jurisdictions, this authority is written into a statute or code. In other jurisdictions, the authority is found in the common law, based on previous judicial decisions.
2. Any requirements imposed by a statute or code should be strictly adhered to. For example, in some situations an officer will have to sample and analyze the goods before determining whether to seize them. Under some federal and state laws, the officer must pay for the items to be sampled. This is true, for example, under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). An officer may also be required to split a sample, or to give the owner a receipt for the material obtained. (See Module 5, Inspections.)
3. Prior to taking unilateral action, under most circumstances it is best for everyone involved to warn the owner of the public health threat or violation and to request that action be undertaken voluntarily. Often a company will voluntarily withdraw a product from the market or temporarily close a restaurant when notified of the injurious conditions. Apart from being the morally correct thing to do, this action may prevent the costly, adverse publicity surrounding an officially imposed seizure or condemnation action.

Follow statutes and codes to the letter.

Voluntary compliance is the preferred solution.

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<sup>2</sup> Grad, pp. 159-161



Document everything you do!

4. You should carefully document the circumstances giving rise to the sanction and write a full description of the actions taken., especially when you are acting summarily. As indicated in Module 10, you are more vulnerable to a liability action when you act summarily. While courts will usually support your actions, except under the most egregious of situations, you will be better protected if your actions and the basis for those actions are thoroughly documented.

Take the least severe measures possible.

5. You should take the least severe measure necessary to accomplish the goal of protecting the public's health and safety. For example, if a misbranded article is seized and the harm has at least temporarily been abated, in most cases the property should not be destroyed without giving the owner the right to challenge the seizure and intended destruction before a legal tribunal.

Be sure you have your agency's support.

6. You should ensure that you have the full support of your agency, and in many cases the agency's attorneys, before acting summarily. Once again, a fully documented decision which has the support and consent of your superiors will protect you from any legal recourse brought by the owner. It will also ensure that the potentially costly decision is not made in haste, but with full deliberation of the facts and possible alternative actions.



**See Group exercise 6.3 at the end of the module.**



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## Bringing it home...

Have you ever taken or contemplated taking summary action?  
What factors weighed in favor of such action; what factors weighed against it?

How was the public health threat resolved?

Did you follow the recommendations made by Grad? In retrospect, how might you have acted differently?

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*Summary detention of persons: Isolation and quarantine*

Quarantine and isolation must be balanced against individual rights.

The authority to quarantine and isolate contagious persons is among the oldest and most well-established of the state's inherent police powers. At the same time, the exercise of such authority warrants great scrutiny as it affects one of the most cherished of individual rights, the right to liberty and freedom from confinement.

The passage of the Americans with Disabilities Act in 1990 underscores the modern movement toward protecting individual rights and liberties. The act protects individuals from discriminatory governmental action by preventing isolation or quarantine based on popular myth, irrational fears, or noxious fallacies rather than well-founded science. To support an order of commitment, an individualized fact-specific determination must be made that the person poses a danger to himself or others.

With the resurgence of drug-resistant strains of tuberculosis, state and local boards of health are testing the limits of the quarantine authority. Recent amendments to New York's Health Code illustrate this point.

New York Health Code permits detention of non-compliant TB patients.

In 1993 the New York City Health Code was amended to allow for long-term involuntary hospitalization of persistently non-compliant tuberculosis patients. The Code amendments reflected concerns that interrupted treatment would result in the emergence of drug resistant organisms. The revised Code authorizes the Commissioner to remove and/or detain individuals with active tuberculosis, *whether they are infectious or not*, if they cannot be relied upon to complete the appropriate tuberculosis treatment regimen and/or maintain contagion precautions. While the department cannot force people to take medication against their will, it can keep them confined until such time as they do [Section 11.47(d)(5) New York Health Code].

Decisions to quarantine or detain are made on an individual basis.

To protect the rights of the individual and ensure that involuntary commitment is absolutely necessary, the detention decision must be based on an individualized assessment of the patient. The information must include hospital and/or agency records describing the patient's medical condition, prior history of noncompliance with medical treatment and, for infectious patients, the history of compliance with isolation/contagion precautions.

The Health Code reflects modern concerns for due process. Rights of the individual include:

- The right to the least restrictive means possible to protect health and safety. As one court noted, to satisfy this requirement the agency will usually have to show that it has attempted step-by-step interventions, beginning with directly observed voluntary therapy, supplemented by incentives such as food or money reward for taking medication, and enablers such as travel assistance. Commitment is to be the absolute last resort. [*City of Newark v. J.S.*, 652 A.2d 263 at 279.]
- The right to notice and a hearing. Due process requires that persons held in quarantine or isolation not be held longer than the briefest period of time without being given notice and an opportunity to challenge the confinement.
- The right to counsel (court-appointed if the person is indigent)
- The right to present opposing evidence and arguments
- The right to cross-examine witnesses
- The right to request release at any time. Upon request, the Department must hold a hearing within seventy-two hours to consider the continued confinement of the patient.
- The right to periodic review of the need for confinement and movement to less restrictive means where such would protect the public's health



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## Stop and think...

What legal authority does your agency have to summarily detain persons who present a threat to themselves or to others?

What rights must be afforded such persons?

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Does the problem or violation warrant or require additional civil or criminal remedies?

Emergency relief, whether obtained summarily or through court action, provides an immediate and often temporary solution. Once a situation is stabilized, you must consider whether additional relief is required or warranted. (See Figures 6d. and 6e.)



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## Review of terminology...

This module has more new legal terms than the other modules. It may be helpful to stop and review those referring to emergency action now before proceeding to the next sections.

condemnation

embargo

enforcement

injunctive relief

judicial relief

*nuisance per se*

permanent injunction

preliminary injunction

private nuisance

public nuisance

remedy

sanction

seizure

summary action

temporary restraining order

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## Non-emergency situations

### *Administrative enforcement actions and procedures*

Administrative enforcement is less time-consuming and less costly.

Enforcement is most widely carried out at the administrative level. Public health agencies generally find less time-consuming and less costly to take action at this level than to initiate a civil or criminal court action, and it frequently achieves the desired outcome.

The circumstances which give rise to an administrative action are as varied as the duties and responsibilities of public health agencies. Similarly, administrative enforcement response options and procedures vary significantly among agencies and often among programs within the same agency.

### *Informal responses*

Would the problem or violation be corrected voluntarily? Is an informal resolution acceptable?

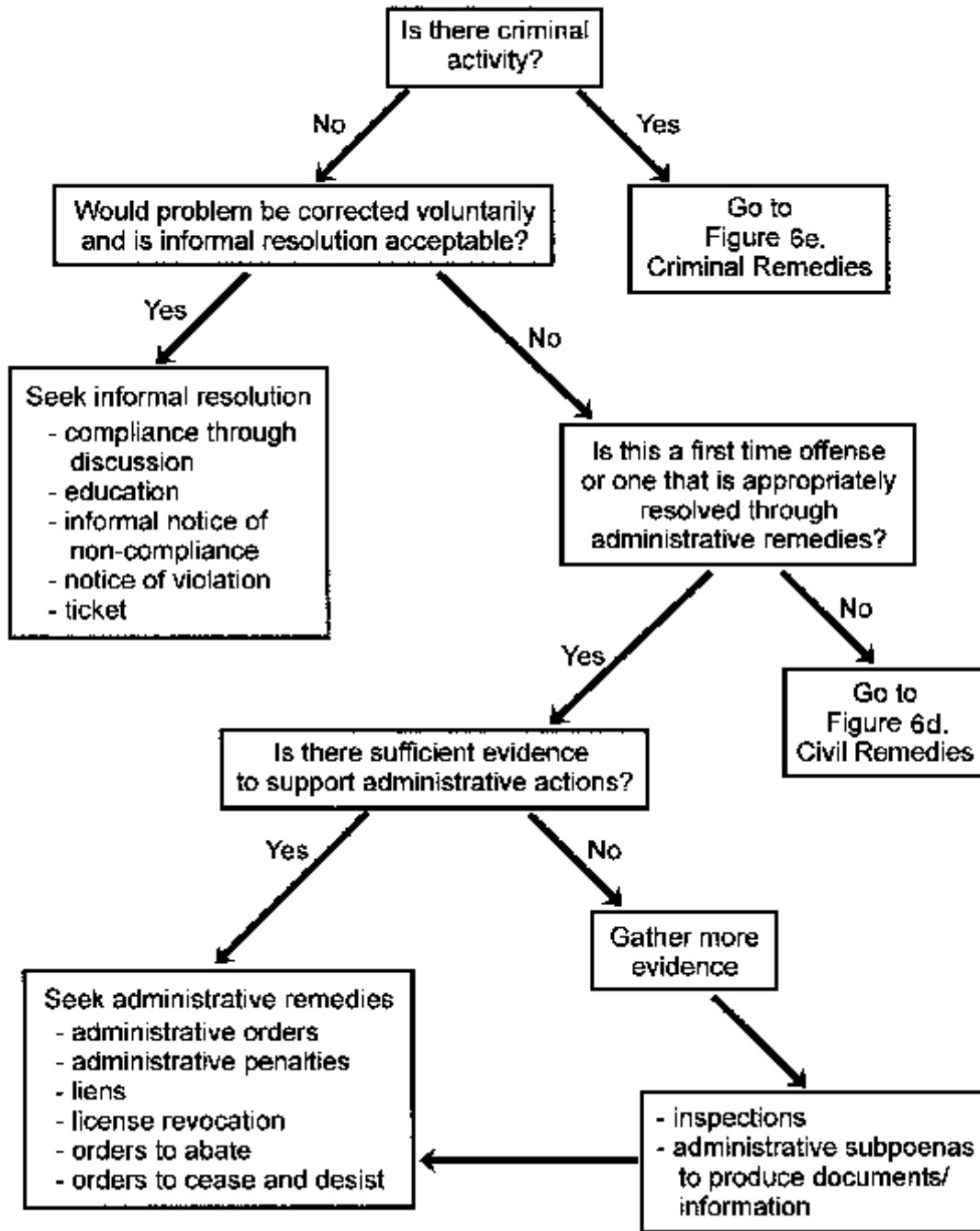
In many instances an informal response will resolve a situation, particularly when the violator is willing to cooperate. Informal enforcement responses include such things as education and training sessions, consultations, warning letters that call attention to a possible violation, and notice (sometimes called a Notice of Noncompliance or a Notice of Violation).

In some programs a "ticket" may be issued for minor infractions.

In some programs the field officer is given authority to issue a "ticket" for minor infractions. In Arizona, if a county health officer has reasonable cause to believe that someone is violating a sanitary regulation, he may issue a ticket containing the person's name and address, the offense charged, and the time and place the person shall appear in court. An administrative hearing officer presides over the hearing and may impose a penalty of not more than \$500.00 per offense.

This informal proceeding is available only in the case of petty offenses and minor misdemeanors. [ARS, Title 36, Public Health and Safety, Chapter 1 State and Local Boards of Health, 36-169.] As with a traffic ticket, this is a relatively low-cost enforcement response, but one that carries sufficient sting to encourage compliance.

**Figure 6c. Non-Emergency Situations  
Administrative Remedies**







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## Bringing it home...

What are some informal enforcement options available to your agency?

Are there specific options for those who cooperate voluntarily?

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Warning letters, notices, and orders, which are discussed below, are often accompanied by an offer to hold an informal conference with the agency to discuss the facts surrounding the alleged violation and to gain voluntary compliance. Before attending such a conference, you should review the negotiating principles described in Module 8, Negotiation.



### Stop and think...

Name two benefits to be derived from granting field officers the authority to issue a "ticket" upon discovering a regulatory violation.

Name two risks presented by granting a field officer such authority.

Answers:

The benefits of an enforcement ticket option include: prompt notification of a potential problem, immediate notice of the need to correct a situation, a relatively swift procedure for penalizing an offender, and a low cost enforcement response. The risks presented by an enforcement ticket action include: the potential for making a hasty and incorrect determination, and unilateral action by the field officer without first gaining approval and support of agency superiors. Obviously where there is little room for judgment (for example, a parking meter violation) the risks are small. Where however the regulatory program is complex, calling for greater knowledge and judgment on the officer's part, the risks increase.

### *Formal administrative enforcement options*

Formal responses may be required in high profile cases or for repeat offenders.

Warnings and notices are frequently the first stage of an enforcement process that may proceed to progressively more formal measures if the violation or problem is not corrected voluntarily. While an informal response may resolve a problem, a more formal response may occasionally be required for policy reasons, for example where the problem has been highly publicized, where the matter involves a repeat offender, or where the type of violation is a high enforcement priority for the agency. Factual and policy considerations will determine the agency's choice of responses. The determination of which options to follow should be made through discussion with agency supervisors.

Formal administrative enforcement responses include:

- Administrative complaints and orders compelling a person or entity to take some corrective action or to comply with the law
- License revocation proceedings

*Administrative orders*

Administrative orders compel compliance and may exact fines.

In most jurisdictions, local boards of health and local or state public health agencies have authority to issue administrative complaints and orders which compel a person or entity to comply with a local code or state regulatory requirements, to abate a hazardous condition, or to cease a prohibited activity. In addition administrative agencies typically have statutory authority to impose fines or penalties for past or present violations.

For example, in Arizona local health departments may issue an order to an owner or occupant to remove a nuisance or source of filth from private property. If the person does not comply within twenty-four hours, the agency may impose a civil penalty of not more than \$500.00. The agency may also remove the source of the nuisance at the owner’s expense (or at the expense of whomever caused the nuisance).

Administrative orders must be enforced by the courts.

Administrative orders are an important public health enforcement tool, however administrative agencies do not have the authority to enforce compliance with their orders. Thus, if an administrative order is disobeyed public health officials must seek an enforcement order in court.

*License revocation proceedings*

The state’s power to revoke licenses acts as a threat and keeps licensees compliant.

Licensing programs are one of the primary means used by states to protect the public’s health and the power to revoke a license for regulatory or permit violations is among the states’ most effective enforcement tools. While licenses are revoked infrequently, the threat of doing so is enough to keep most licensees compliant. Licensing laws typically provide for increasingly severe sanctions; providing boards and agencies flexibility in penalizing a noncompliant person or entity. The right to revoke a license is usually in addition to a board’s or agency’s authority to seek civil or criminal penalties and injunctive relief.

Example

Utah’s rules governing the licensure of health care facilities provide a good example of how a state licensing program provides an array of increasingly harsh sanctions. Upon discovering a violation, a health facility is issued a Statement of Findings identifying:

- the statute or regulation violated
- a description of the violation
- facts which constitute the violation
- classification of the violation<sup>3</sup>

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<sup>3</sup> Class I indicates a situation presenting an immediate hazard; Class II includes any violation relating to the operation or maintenance of the facility which has a direct or immediate relationship to the health, security or safety of the patients; and Class III indicates operating a facility without a license or with an invalid license.

Plan of Correction must be submitted.

The licensee is then required to submit a Plan of Correction. If the Department finds the Plan of Correction unacceptable it issues a Notice of Agency Action directing a Plan of Correction. If the violation remains uncorrected after the specified time, the Department has ten working days to notify the licensee of further agency enforcement action.

Sanctions for violating a Plan of Correction

Sanctions for violating a Plan of Correction include:

- Denial, suspension, or revocation of a license for serious infractions or conduct adverse to the public health, morals, and welfare of the public
- Restriction or prohibition of new admissions to the facility
- Public notice in the media disclosing the violation or illegal conduct of the licensee and the agency action taken
- Placement of department monitors in the facility, at the licensee's expense, until corrective action is completed

License revocation is mandatory if noncompliance is chronic.

The Department may also order the immediate closure of a facility if the health, safety or welfare of the patients or residents cannot be assured.

In the case of chronic noncompliance where a facility has demonstrated repeated violations, the Department may issue a written notice warning of the possibility of license revocation. If, following such warning, the conduct persists, revocation becomes mandatory and no lesser sanction may be substituted by the Department, Health Facility Committee, or the courts.

### *Compelling information*

Subpoenas demand testimony or evidence, and are enforceable.

Some public health programs have the authority to issue subpoenas to compel the testimony of witnesses or to demand the delivery of relevant documents and other physical evidence. This is a very broad and often under-utilized authority. Administrative subpoenas are generally enforceable by the local superior court.

For example, the Arizona statute governing licensing and regulation of midwifery authorizes the Director of the Department of Health Services to issue administrative subpoenas to further *an investigation* into *possible* violations of the midwifery law. (ARS, Title 36 Public Health and Safety, Article 7 - *Licensing and Regulation of Midwifery*, 36-756.01.) Using this authority the agency may gain access to "patient records, including clinical records, medical reports, laboratory statements and reports, files, films and oral statements relating to patient examinations, findings and treatment, *wherever such evidence is located.*" (emphasis added).



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## Stop and think...

Does your program have authority to issue subpoenas to support an investigative effort? Would your public health program benefit from the authority to issue administrative subpoenas?

What kind of information would you want to obtain through this mechanism?

If you lack such authority, how else might you legally gain access to the desired information?

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### *Principles of due process*

Persons whose rights are affected have a right to due process.

Whether an agency revokes a license, issues a cease and desist order, or seeks to involuntarily commit an individual, there are certain principles and procedures which must be followed.

Except in emergency situations, before an agency takes action that may affect individual liberty or property rights, the affected person is constitutionally entitled to “due process.” The term “due process” is not clearly established in the law, nor is the law explicit about the process that is “due.” (See Module 1, Introduction for an expanded discussion of due process.)

“Meaningful opportunity to be heard” must be interpreted to fit the individual case or context.

At a minimum, due process encompasses the notion that before the agency makes a final decision affecting a person's rights, that person is entitled to receive adequate notice of the intended action and given “a meaningful opportunity to be heard.” Exactly what is meant by “a meaningful opportunity to be heard” and what is required of a public health agency will vary considerably depending upon the context or circumstances and the laws of the particular jurisdiction. Clearly a full-blown trial type hearing is not required in every instance. If it were, it would require an enormous outlay of resources which would significantly hamper the agency's ability to function. Generally speaking the courts will balance individual rights with the need to protect the agency's resources and efficiency. The more severely affected are one's rights, as in the case of actual physical confinement of a person, the more elaborate is the process that is due.

Adjudicatory hearing defined

Thus, due process suggests that some type of hearing will be required. In some jurisdictions these are called “contested cases,” in others they are referred to as adjudicatory hearings. Illinois law defines a contested case as “an adjudicatory proceeding, not including rate-making, rule-making, quasi-legislative, informational or similar proceedings, in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” (*Illinois Administrative Procedure Act*, 127, 1003.03). In addition, where facts are not in dispute, the need to cross-examine witnesses diminishes.

An adjudicatory hearing may include some or all of the following elements. Note that some of these rights are more fundamental than others.

#### 1. Right to notice of the hearing

Proper notice includes: the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is being held; a reference to particular sections of statutes and rules involved; and a statement of the factual matters giving rise to the complaint. The defendant is generally required to file an answer or other responsive pleading.<sup>4</sup>

<sup>4</sup> These legal terms are defined in the following section on Civil Proceedings.

## 2. Right to a hearing

The hearing may include the following elements:

- Sworn testimony given under oath
- Right of the defendant to present testimony
- Right to confront and cross-examine witnesses
- Right to present rebuttal testimony
- Right to a transcription of the hearing
- Right to subpoena witnesses and documents

## 3. Right to be represented by counsel

Except where someone's life or liberty is in jeopardy, the right to be represented by counsel is not absolute. In instances where persons are subject to quarantine or confinement, there is a right to legal counsel. If the person is indigent, this includes a right to counsel appointed and paid by the court.

## 4. Right to an impartial decision-maker

Administrative hearings are usually conducted by employees of the administrative agency who preside over the hearing, acting in the capacity of judge. Because agency representatives are both bringing the complaint and acting as judge, scholars have questioned whether administrative hearings offer an impartial decision-maker. The courts laid this challenge to rest long ago, deciding that because administrative proceedings are typically concerned with complex technical issues, administrative law judges employed by the agency bring special technical expertise which overrides any concerns about the apparent potential for bias.

## 5. Burden of proof

When an agency seeks to affect an individual's rights or interests, it will ordinarily have the burden of proving the facts which support the government's legal basis for taking such action. For most adjudicatory proceedings, the administrative agency must meet one of two standards of proof, either the "preponderance of evidence" standard or the "clear, cogent and convincing evidence" standard. The burden of proof shifts to the individual or entity in the case of an affirmative defense.

See explanation of standards of proof and affirmative defense in the section on Evidence.

## 6. Right to written findings and conclusions of law

The reasons for the hearing officer's decision must be based on facts in the agency's administrative records and files and on facts presented at the hearing. The written decision and order must also include notice of the right, if any, to appeal the decision and the time limit for requesting a review.

## 7. Right to appeal the decision or request reconsideration

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As noted previously, the elements and proceedings in contested cases vary significantly among agencies, and among programs within an agency. Some states attempt to categorize adjudicatory proceedings as either "formal" or "informal." As the name would indicate, formal proceedings require more elaborate procedural rights. For example, hearings governed by Utah's "procedures for formal adjudicative proceedings" require virtually all of the rights listed above. However, when Utah state agencies enact rules designating one or more categories of adjudicative proceedings as "informal," then:

- The party need not file an answer or other responsive pleading.
- Discovery is not permitted.
- Testimony is not necessarily given under oath.
- There is no requirement that the hearing be recorded.
- The right to conduct cross-examination and to submit rebuttal testimony is not guaranteed.





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## Stop and think...

When persons' or entities' interests are impacted by your program, which of the above procedural rights apply?

Are there any differences, depending on the right that is affected or the extent of infringement?

Why may these rights be dispensed with in an informal hearing?

In what type(s) of hearings would these rights not be considered an essential element of due process?

Notice of a hearing is one the basic rights applicable to all adjudicatory hearings. What is there about this right which distinguishes it from the others?

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*A word about administrative rules of evidence*

Rigid rules of evidence do not apply to administrative hearings.

Because administrative hearings are tried before a hearing examiner or judicial officer and not before a jury, many of the cumbersome and rigid rules of evidence that have been designed to protect the jury from confusing and possibly unreliable evidence do not apply in administrative hearings. Evidence that would not be admitted in a judicial trial because it was irrelevant, immaterial, incompetent, not properly authenticated, or redundant under formal rules of evidence is often allowed in an administrative hearing. (See also the following section on Evidence.)

Since administrative hearings differ so widely in scope and significance, it is impossible to articulate one guiding standard regarding administrative rules of evidence. You should familiarize yourself with the rules of procedure and evidence which govern the administrative hearings pertinent to your work. This will help you avoid making costly mistakes in your earlier investigative efforts, mistakes which could adversely affect the outcome of an administrative hearing or judicial trial.



**See Group exercise 6.4 at the end of the module.**

**This is the end of Module 6 - Part 1  
Be sure to also print or view Module 6 - Part 2**