



Introduction to Rulemaking and How to Deal with Unpromulgated Rules and Guidance

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Speaker Bio



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Brian assists clients in obtaining governmental approvals for controversial energy, natural resources, and urban development projects. As part of this work, Brian advocates for companies before local, state, and federal regulatory bodies and on judicial review. Brian also assists clients in transactions involving complex environmental issues.

Agenda

- **Background**
- **Rulemaking requirements**
- **Unpromulgated rule challenges**
- **Questions**



Background



Definition of Rule

"Rule" means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.

Minn. Stat. § 14.02, subd. 4.



Types of Rules

- **Legislative**
- **Procedural**
- **Interpretive**

Legislative Rules

- Rules that make substantive law under power delegated by the legislature
- Require specific statutory authorization

Procedural Rules

- **Set forth the nature and requirements of formal and informal procedures relative to the administration of agency duties.**
- **Minnesota Administrative Procedures Act requires all agencies to adopt procedural rules.**

Interpretative Rules

- **Make specific the law enforced or administered by the agency**
- **Interpretative-rule concept now mostly relevant to unadopted rules**
 - Notice-and-comment rulemaking applies
 - Have force and effect of law
 - Arguably, need not be a delegation of statutory authority

Rulemaking

Types of Rulemaking

- **With hearing**
- **Without hearing**
- **Exempt**
- **Expedited**

Pre-Requisites to Rulemaking

- Rules may be adopted only if authority delegated by law.
- An agency must publish a notice of intent to adopt rules or notice of hearing within 18 months of the effective date of the law authorizing or requiring rulemaking.

Pre-Rulemaking Requirements

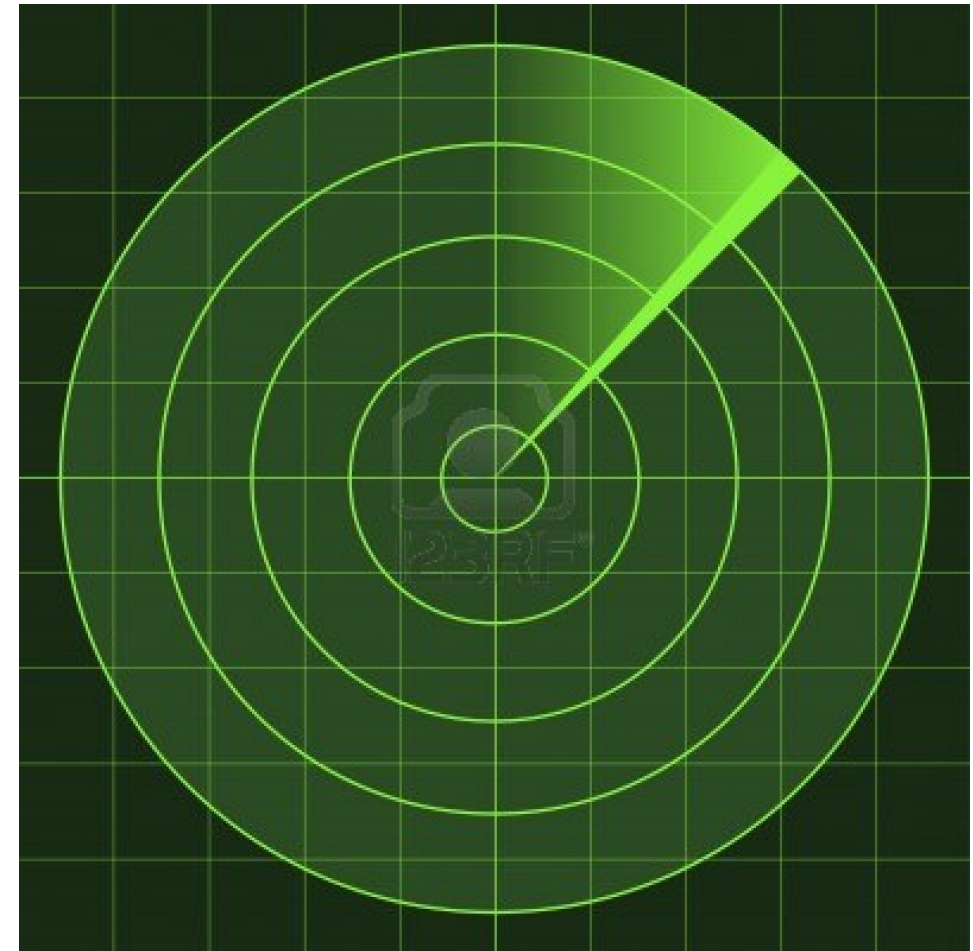
- **60-days before publication of a notice of intent to adopt or a notice of hearing, the agency must solicit comments from the public on the subject matter of a possible rulemaking proposal.**

Rulemaking With a Hearing

- **30 days before the hearing date, agency must give notice of its intent to adopt rules.**
 - **Copy of proposed rule or description of proposed rule**
 - **Statutory authority for the rule**

Statement of Need and Reasonableness (SONAR)

- Rules must be accompanied by a Statement of Need and Reasonableness (SONAR)
- The SONAR must include:
 - Description of those affected
 - Cost of implementation, enforcement, and compliance
 - Determination of whether less costly or intrusive methods could achieve the agency's purpose
 - Alternative methods of achieving goals
 - **Description of the reasonableness of each section of the rule**



Hearing Process

- An administrative law judge (ALJ) conducts the hearing.
- The agency must make an affirmative presentation of facts establishing the reasonableness of the proposed rule.
- The agency and interested parties may present written or oral evidence.
- Attendees may question agency representatives.



Post-Hearing

- **5 working days to 20 calendar day comment period after hearing**
- **Five working day rebuttal period**
- **Agency may make revisions to the rule during comment and rebuttal period provided the changes are insubstantial**



Rulemaking Without a Hearing

- **Notice of Proposed Adoption of Rules Without Public Hearing**
- **The public has 30 days to comment on the rule.**
- **A public hearing will be held if 25 or more persons submit a written request for a public hearing.**



No Request for Hearing

- Agency must submit the rule to the ALJ assigned to the matter
- May modify the rule if supported by the data and views submitted to the agency provided the rule is not substantially different
- Must be submitted within 180 days of the comment period closing

Order Adopting Rule

- **Description of changes made to the rule and explanation of why the changes are not substantial**
- **Confirmation that the agency has complied with all procedural requirements**
- **Statement that the rule is needed and reasonable**
- **Signature of the person authorized to adopt the rule**

ALJ Review

- ALJ has 14 days from submission of rule to approve or disapprove of the rule if there was no hearing.
- ALJ has 30 days from the close of the record if a hearing is held.
- ALJ may disapprove of the rule on two different grounds
 - Illegal—decision binding on the agency
 - Need and reasonableness not established
 - Decision not binding on the agency
 - Agency must submit the rule to the Legislative Coordinating Commission and committees of the house and senate responsible for

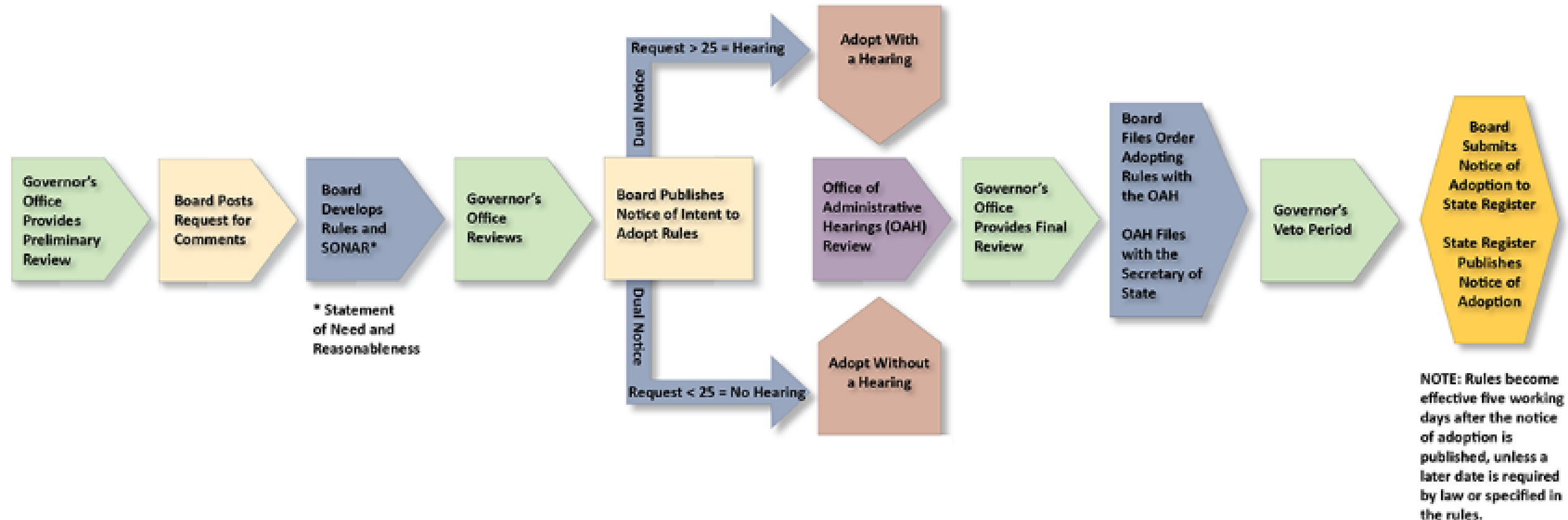


Publication

- Approved rules are forwarded to the Secretary of State.
- The revisor of statutes must also approve rules as to form.



Minnesota Rulemaking Chart



Exempt Rules

- **Must be:**
 - A statutory exemption or
 - “Good cause” exception (rarely used)
- **To be enforceable the rule must:**
 - Be approved by the revisor as to form
 - ALJ approves rule as to legality, including whether it meets the “good cause” exception, if applicable
 - Copy is published in State register
- **Rule is valid for only two years**

Expedited Rule

- A statute may reference the expedited rule section (Minn. Stat. §14.389) to permit an expedited process
- 30-day comment period on proposed rule after notice
- ALJ has 14-days to review legality of rule after submission by agency
- Depending on the language of the authorizing statute, a hearing may be requested by at least 50 people



Judicial Review of Rules

- **Two avenues:**
 - In a case applying the rule
 - Through a declaratory judgment action in the court of appeals
- **Rule may be invalid if it:**
 - Violates constitutional provisions,
 - Exceeds statutory authority, or
 - Was adopted upon unlawful procedures.



Challenges to Unpromulgated Rules

The Problem

- **Agencies often issue guidance and other pronouncements.**
- **Generally, these statements are not problematic because they don't implement or make specific the laws.**
- **Sometimes agencies cross the line by attempting to enforce guidance as though it is a duly adopted rule.**



Unpromulgated Rule Challenges

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Minn. Stat. § 14.02, subd. 4.

Rule v. Case-by-Case Adjudication

- **Agencies can apply the law to specific facts without promulgating a rule.**
 - **Must apply only to the specific parties**
 - **Cannot be a blanket statement of future effect**

Ways to Challenge Unpromulgated Rule

- In an enforcement action
- Via a petition to the Office of Administrative Hearings (OAH)

Unpromulgated Rule Challenges (OAH)

- Unpromulgated rules can be challenged in OAH by a petition
- An ALJ can direct the agency to cease enforcement of the unpromulgated rule.
- No statute of limitations
- Binding on the agency

Appeal Unpromulgated Rule

- Appeal unpromulgated rule decision in same manner as facial challenge to a promulgated rule (declaratory judgment petition in the court of appeals)
- Must first seek ALJ decision
- No deadline for appeal to the court of appeals

Unpromulgated Interpretative Rules

- **Unpromulgated interpretative rules may be valid if:**
 - Consistent with the plain meaning of an unambiguous rule or
 - Long-standing interpretation of an ambiguous rule

Sources of Law and Guidance

- **Minn. Stat. ch. 14 (Minnesota Administrative Procedures Act)**
- **Minn. R. ch. 1400 (Office of Administrative Hearings APA Proceeding Rules)**
- **Minnesota Rulemaking Manual**

Questions



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